Supreme Court of the United States.

OCTOBER TERM, 1898.—NO. 773.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Petitioner, vs. HEMAN CLARK, Respondent.	On Petition for *Certiorari*.

Brief for petitioner, The Chicago, Milwaukee and St. Paul Railway Company, upon application for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review the decision of the said Circuit Court of Appeals in the case of the Chicago, Milwaukee and St. Paul Railway Company, Plaintiff in error, against Heman Clark, Defendant in error.

This application involves a consideration of the question whether the decision of the Circuit Court of Appeals for the Second Circuit, in the case above mentioned, is not so far contrary to or inconsistent with the decisions of the Supreme Court of the United States and of other Circuit Courts, as well as decisions of the Courts of different States, in reference to the matters and questions of law involved in, and which were the

subject of controversy in, the said case, as to require that the said case should be certified to the Supreme Court for its review and determination under and pursuant to the provisions of Section 6 (Paragraph 2) of the Act of Congress of March 3, 1891, establishing Circuit Courts of Appeal, and for other purposes.

The questions involved in this application, and which appear upon the record of the proceedings in the said case in the Circuit Court of Appeals, refer and relate almost exclusively to the legal character and effect of a certain instrument or agreement in the nature of a release or acknowledgment of satisfaction, made and entered into between the parties to this case on March 9, 1888, of which the following is a copy:

" WHEREAS, a final estimate has been made by D. J. " Whittemore, Chief Engineer of the Chicago, Mil- " waukee and St. Paul Railway Company, of all the " work done and material furnished under the con- " tract made between said Railway Company and " Heman Clark, bearing date March 6th, 1886, for " the construction of the railroad from Ottumwa, in " Iowa, to the Missouri River, including all extra " work performed and material furnished of every " kind and description; which estimate, with the " prior monthly estimates, less deductions made for " work not done and work assumed by said company, " amounts to.....$3,895,798 79

" AND WHEREAS, the further sum of..... $34,598 90 " should be credited to said Clark for materials sold " by him to said company, and certain rebates and " other matters of that description, making, with the " amount of said estimates, the sum of $3,930,397 69

" AND WHEREAS, the said Chicago, Milwaukee and St. " Paul Railway Company has paid the said Clark to " apply on said contract, in money, material, labor " and transportation, the sum of..... $3,626,865 20

" AND WHEREAS, by the terms of Section 4, Article 13, " of said contract, said Clark was to be charged in " addition for transportation the sum of $50,000 00 " and by a supplemental contract was to allow the " said Railway Company, by way of forfeiture in " case said railway was not completed by the first " day of June, 1887 the further sum of $40,000 00 " making the amount paid on said contract, together

" with the allowance of said transportation and the
" allowance of said forfeiture, the sum of $3,716,865 20
" leaving the amount still due said Clark on said
" contract the sum of ---------- $213,532 49

" AND WHEREAS, in and by said contract it was pro-
" vided that the said Heman Clark, party of the first
" part, should save the said Railway Company free
" and harmless from all claims that might be made
" against said Railway Company for liens of work-
" men and claims of subcontractors, and from all
" damages arising from not keeping sufficient fences
" to preserve crops and restrain cattle, and from all
" damages for cattle or other domestic animals killed
" or injured, and from all damages suffered by said
" subcontractors and employees while engaged upon
" said work, of which said class of claims, about
" $40,000 in amount, have been made upon and are
" now pending in courts by divers claimants against
" said Railway Company, and the sum of $40,000 of
" the amount so due as aforesaid under said con-
" tract to the said Heman Clark has been reserved
" and set aside by said Railroad Company as indem-
" nity or security for the payment of said claims and
" of such other claims of the same class as hereafter
" be made, in case said claimants or any of them re-
" cover judgments against said Railway Company,
" and the said $40,000, or the balance thereof, after
" paying and settling such claims as may be estab-
" lished against said Railway Company, is to be paid
" over to the said Heman Clark as soon as said
" claims are satisfied or said Railway Company
" suitably indemnified from any loss on account of
" the same; which ---------- $40,000 00
" deducted from the sum of ---------- $213,532 49
" so as aforesaid due said Clark, *leaves*
" *due and owing by said Railway Com-*
" *pany and now payable on said con-*
" *tract to said Heman Clark* the sum of $173,532 49

" NOW, THEREFORE, BE IT KNOWN, THAT I, THE SAID
" HEMAN CLARK, HAVE RECEIVED OF AND FROM THE SAID
" CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY
" THE SUM OF ONE HUNDRED AND SEVENTY-THREE THOUSAND
" FIVE HUNDRED AND THIRTY-TWO AND $\frac{49}{100}$ DOLLARS
" ($173,532.49), IN FULL SATISFACTION OF THE AMOUNT DUE
" ME ON SAID ESTIMATES, AND IN FULL SATISFACTION OF ALL
" CLAIMS AND DEMANDS OF EVERY KIND, NAME AND NATURE,
" ARISING FROM, OR GROWING OUT OF, SAID CONTRACT OF

" MARCH 6TH, 1886, AND OF THE CONSTRUCTION OF SAID " RAILROAD, excepting the obligation of said Railway " Company to account for said forty thousand dollars " as hereinbefore provided.

" HEMAN CLARK.

" WM. C. EDWARDS."

(Record, pp. 113–115, fols. 339–345 ; and also pp. 203–206, fols. 609–616.)

This instrument was set up by the Railway Company as a defense in an action brought in the Supreme Court of the State of New York by Heman Clark some five years and a half after the execution and delivery of it, and after the payment of $173,532.49 therein stated to have been paid in full satisfaction, to recover some $305,000 claimed to be due to him on account of the construction of the railroad therein referred to, and for extra work and other claims growing out of the contract. The case was removed to the U. S. Circuit Court, Southern District of New York, on the ground of diverse State citizenship of the parties.

One of the causes of action was based upon allegations that there were $71,057.63 unpaid upon the amount earned by and due to the plaintiff for work done under the contract and other matters, which amount it was claimed upon the trial of the cause was made up or consisted in part of a sum of $9,558.63 for nut locks furnished by the R. R. Co. to and used by Clark in the construction of the road, which had been charged to Clark by the railway company as a part payment on the contract, and was included in and as a part of the sum of $3,626,865.20 which was stated in the said receipt or acknowledgment as having been paid to Clark to apply on the contract in money, material, labor and transportation ; and another part of which consisted of the sum of $40,000, which, as stated in the said acknowledgment, " by a supplemental contract," Clark " was to allow to the Railway Company, by way of forfeiture, in case said railway was not completed by the first day of

June, 1887;" as to both of which items or matters it will be seen that they were embraced in and formed a part of the settlement evidenced by the acknowledgment of March 9, 1888.

The balance of the claim of $71,057.63 claimed to be unpaid was for part of the $40,000 stated in said instrument as reserved to meet claims, which it was claimed had not been expended by the railway company for the purposes specified in said receipt, or that the same had been improperly expended to the extent of $21,499; but as to this the trial Court found that the railway company had duly paid out and expended that sum and accounted for such expenditure to Clark, and for $521.71 in excess thereof. *(Record, pp. 136, 219)*

The action below was not brought to set aside this receipt or acknowledgment of satisfaction, nor was anything alleged against it as having been procured by fraud or misrepresentation. In fact, the giving of this receipt or acknowledgment was not alleged at all in the complaint.

The trial Court held that the signing and delivery of this receipt or acknowledgment on March 9th, 1888, and the acceptance of the check for $173,532.49, were as to the two sums of $9,558.63 charged for nut locks, and $40,000 charged by way of forfeiture for non-performance in time, wholly without consideration, and did not constitute any bar to the recovery by the plaintiff of those sums, *(Record, pp. 118, 119, fols. 354-5)*; and that the signing and delivery of said receipt and the acceptance of the check did not constitute a payment or an accord and satisfaction of the said sums of $9,558.63 and $40,000. *(Record, p. 119, fol. 356)*

The Circuit Court of Appeals held that the giving of the receipt and acknowledgment was without consideration, for the reason that the railroad company paid to Clark upon its execution only the amount which it admitted to be due; and that, as Clark received only the amount to which he was entitled anyway, there was

no consideration to him for surrendering his claims as to the nut locks and forfeiture.

In the opinion of Mr. Justice LACOMBE in the Circuit Court of Appeals it is said

" there is nothing in the findings to show that the plaintiff signed this receipt improvidently or without due consideration, *or that it failed in any way to set forth accurately the agreement entered into between the parties on that day ;* nor that the plaintiff was under any pecuniary stress pressing him to accept a smaller sum than was due." *(Record, p. 518)*

That these items of $9,558.63 charged for nut locks and the $40,000 charged for forfeiture were in dispute, appears by the statement of the Referee before whom the case was tried, that

" in February, 1888, the parties endeavored to adjust and ascertain the exact amount remaining due to Clark, *with the result of differences of opinion which ultimately led to this suit.*" *(Record, p. 551, fol. 453)*

And in the opinion of the Circuit Court of Appeals, it is said that it was not understood that the Referee had held, nor did the Court intend to hold

" that there was any bad faith on the part of the company in advancing these claims for the nut locks and for time penalty ; *that both items were legitimate matters of dispute* and unless settled by agreement of the parties might fairly be brought by either party into Court." *(Record, p. 517)*

Nevertheless, the Court held that, although both the $40,000 for time forfeiture and the $9,558.63 for nut locks were embraced within the statement of account in and by which the settlement was made, and were, therefore, embraced in the settlement, and that these two items were in dispute between the parties in good faith until the settlement was made, there was no consideration for the relinquishment of those claims by the plaintiff Clark, for the reason that he only received the amount which was due to him after deducting the amount of those claims.

But it is respectfully submitted that, inasmuch as those items were in dispute in good faith, and were as stated by the Court legitimate matters of dispute, the account itself as a whole, and the amount due, was in dispute, and therefore unliquidated; that the account was an entire thing, and where one or more items of it were in dispute, the account as a whole was in dispute; and when such is the case and a certain amount was received in settlement, which was paid on condition that it was to be received in full satisfaction and settlement of all claims and demands of every kind, name and nature arising from and growing out of the contract and of the construction of the road, such payment was a good consideration for the settlement of the account as a whole. The account, which is an entire thing, comprising all of the credits and debits on both sides, cannot be settled and liquidated by piecemeal. This account was not so settled, but was treated as an entire thing, and settled as such by mutual concessions by each party to the other, the railway company conceding to Clark credit for matters outside of the contract amounting to $34,598.90, and Clark conceding to the railway company the charge for nut locks and the forfeiture.

The decision of the Circuit Court of Appeals that the agreement of March 9, 1888, was without consideration, is, it is submitted, inconsistent with, and contrary to, the decisions of the United States Supreme Court in the cases of the *United States vs. Child, 12 Wallace, 232-243,* and *United States vs. Adams, 7 Wall., 463,* and other cases, notwithstanding the differences which the Court suggests distinguish the decisions in those cases from this one.

In regard to those cases the Circuit Court of Appeals per Mr. Justice LACOMBE, says:

"In all these cases the amounts paid in settlement were unliquidated, since but for the finding of the

board, the Government could have litigated them all in good faith, and in giving up resort to the court, at the same time going to the expense of constituting a special tribunal to adjust the claims, and securing the more expeditious payment of what might be found due, there was certainly abundant consideration to sustain the settlements." *(Record, p. 526)*

But there certainly was in these cases the element which the appellate court seemed to consider established a want of consideration in the settlement in this case—viz., the payment of only the amount admitted by the Government to be due—so that the Government paid only the amount which it admitted it was obligated to pay, and the claimant received nothing more for his disputed claims.

The case of *United States vs. Child (12 Wallace, 232)* was an appeal from the Court of Claims *(Child vs. United States, 4 Court Claims, R. 185)*. In that case, in the Court of Claims, Child & Co. were plaintiffs, claimants against the United States for the sum of $163,000, claimed as a balance due them on a sale of military stores to the Government. It appeared that the chief quartermaster of the Department of the West had purchased from the claimants, military stores for the United States, the fair value of which was, *as the Court of Claims found*, *$478,119.62*, the price charged by the claimants, for which vouchers were given by the quartermaster. Payment of the vouchers was suspended by the War Department pending an investigation, and a military commission was appointed to investigate the claim, with others. The claimants' books and papers, vouchers, &c., were seized and produced before the commission. As the Court of Claims said:

"The commission examined them all, and at the conclusion of its investigations endorsed upon the vouchers the amount allowed by it, and ordered that the sum of $163,111 be deducted from the vouchers. The commission also withheld all of the vouchers until the claimants signed a receipt or agreement, *not under seal and without consideration*," (as the Court of Claims

held), 'which provided that, when the reduced amounts allowed by the commission should be paid, the payment should be in full of all the claimants' demands against the United States.'"

The Court of Claims further found that

"the claimants at the time of receiving payment made no formal objection or protest, but were required to and did sign a receipt, *not under seal and without consideration*, whereby they acknowledged having received such reduced amounts, *in full of the above account.*"

The Court of Claims also held, as matter of law:

"that the agreement or receipt, signed by the claimants on receiving back their vouchers, was obtained and exacted by duress of their goods, *and was wholly without consideration and void;*" and further: "That the receipts required by the quartermaster at the time of payment, expressing upon their face that a less sum was received than that due, *and being without consideration*, did not operate as a release of the balance of the claimants' accounts and were wholly void."

As to the matter of consideration, the United States Supreme Court, upon appeal from this decision *(12 Wall., 243, per Miller, J.)* said: "Although it is found "by the court that these receipts were not under "seal and were without consideration, **the latter "statement must have some meaning not "apparent to us, in view of the other fact "found also, that over $315,000 was paid "to the claimants on those accounts at the "time they gave the receipts."**

That is, in effect, saying that the amount paid on signing the receipt, was a sufficient consideration for the release of the rest of their claims.

But, it is submitted that, when the commission appointed by the Government had reported as to the amount which should be allowed on the claimant's demand, and the amount to pay it had been appropriated, the demand was liquidated at that amount; the

Government could not "in good conscience" refuse to pay it; nor could it have any "defense that could be urged in good faith or with color of right" against its immediate payment, or to any action which might be brought to recover it.

In an earlier case, *(United States vs. Adams, 7 Wallace, 463)*, a similar ruling was made by the U. S. Supreme Court. The claimant, Adams, presented certain claims against the Government; one for $83,500 for a *balance* due, for building certain mortar boats according to a specific contract; and another for $25,400, a balance claimed to be due, for building tugboats for the Government under a contract. A commission appointed to investigate the claims allowed $75,959.24 to be due upon the first claim, and $20,196 on the second; and gave *vouchers* therefor, which the Government paid, and for which the claimant gave a receipt in full of all demands, *which he signed under protest. (7 Wall., 466)*.

The Court of Claims held that Adams was entitled to recover the whole of the contract price, for which judgment was given. But the U. S. Supreme Court held that the claimant could not afterwards recover for the balance of the contract price, *(7 Wall., 467)*: that the acceptance of the payment of the amount of the voucher was a bar to any further demand against the Government, *(pp. 479-481, &c.)*; and that this was so, independently of the signing of the receipt in full; that *it was the acceptance of the money payment which constituted the accord and satisfaction.*

The doctrine of this case was affirmed by the Supreme Court in the *Child case (12 Wallace, 232)*, where it was held, that in neither case was the voluntary submission of the claim against the government to the commission appointed to investigate such claims, essential to bar a recovery. "*The bar in both cases* "*rested upon the voluntary acceptance by the claimants* "*of a smaller sum than their claim as a full satisfaction* "*of the whole, and acknowledging this in a receipt for* "*the amount paid.*"

The Court said: "We lay out of view in this case, "as in the Adams case, the receipts which they gave "under protest, in order to regain possession of their "vouchers. But we cannot disregard the finding of "the Court, that, after Congress had appropriated the "sums found due by the commissioners * * * the "claimants received the amount so allowed, and signed "upon each voucher a receipt whereby they acknowl- "edge having received said reduced amount '*in full* "*of the above account.*'" *(12 Wall., 243)*

And the Court also said: "It is of no avail to urge "that the Court of Claims has found that the whole "claim was just and ought to be paid. After the com- "promise that question was no longer open to in- "quiry. *It is the very essence of such adjustments of* "*disputed rights that the contest shall be closed.*" *(12 Wall., 245)*

Both of these cases were again approved by the Supreme Court, in *United States vs. Justice (14 Wall, 535)*, where it was held that where a contractor with the United States and the Government disagree as to what is justly due to the contractor, and the question is referred by the War Department to a commission to audit such claims, and the commission finds a certain sum as justly due, and the contractor receives that sum, he cannot sustain a claim for a further sum, *even though he give no receipt in full, or at all.*

The original claim was a liquidated sum for the sale of guns at a contract price; but the amount due was said to be unliquidated because of claimed offsets.

The Court said *(14 Wall, 547)*: "After waiting "until the five years' limitation to actions of this kind "had nearly expired, he brings this suit to recover the "balance of the claim, according to the original con- "tract price; and the question is, can he maintain "it?" After referring to the fact that the claimant took the sum found to be due him without protest, or "an intimation of dissatisfation," the Court said, "*he* "*cannot afterwards be heard to say that he did not ac-* "*cept this in full satisfaction of his demand.*" "It is "difficult to suppose that at this time he had any other "purpose than to acquiesce in the decision which was "made. *If his purpose were different, why the long* "*delay in instituting suit?* It is hard to believe that "the course subsequently taken *was not the result of* "*an afterthought.*"

All of which is exceedingly applicable to the facts of the present case; where Clark waited for nearly five years and a half, after receiving and acknowledging payment in full satisfaction of all demands, before beginning any suit, or apparently making any claims against the Railway Company.

In all of these cases the amount paid was only the amount admitted to be due by the Government. It paid nothing but what it was admitted it was obligated to pay; and the claimant received nothing for the release of the balance of his claim except the payment of what the Government admitted to be due; which payment under similar conditions the appellate court in the present case held not to be a consideration for such release.

The same rule must be applicable to the one case as to the others.

See, also, *United States vs. Clyde, 13 Wall., 35*, and *Mason vs. United States, 17 Wall., 73*, in which the Court says of a similar settlement that "it is a plain case of voluntary settlement between the parties, *which all Courts hold is final and conclusive.*"

In *Boffinger vs. Tuyes, 120 U. S., 198*, it was held that the payment after an adverse decree in the Appellate Court, of an agreed sum in compromise and settlement of his liability by a surety on an appeal bond, and a written receipt stating that the money is paid "*in full satisfaction of the decree*" rendered against the surety, constitutes an accord and satisfaction. In this case the amount due was doubly liquidated, not by any mere act or acknowledgment of the parties, but by judicial decree affirmed on appeal; matter of record of the highest character; and yet it was held that an accord and satisfaction could be predicated of the payment of an agreed sum in compromise and settlement of the liability.

The rule is the same in the Circuit Courts of the United States.

The Cayuga, 59 F. R., 483 (Circuit Court of Appeals,

6th Circuit, Dec., 1893), and in *Battle vs. McArthur, 49 F. R., 715*, it was held that,

"even though a person does not receive all that is legally due to him, yet, where the *sum actually due is in dispute*, the avoidance of litigation is a sufficient consideration to support a settlement fairly made with full knowledge of all the facts."

And, as the Supreme Court said in *Union Bank of Georgetown vs. Geary (30 U. S. [5 Peters], 114)*,

"to permit a subsequent judicial decision on this point in their favor as having a retrospective effect so as to annul a settlement or agreement made by them under a different state of things, would be sanctioning a most mischievous principle."

As Lord HARDWICKE remarked in *Stapleton vs. Stapleton (1 Atkyns, p. 12)*, following a previous decision of Lord MACCLESFIELD:

"An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreements of the parties, for the right must always be on the one side or the other, and, therefore, the compromise of a doubtful right is a sufficient consideration of an agreement."

And in *Chitty on Contracts (11th Ed), Note 1, p. 46*, it is said:

"The real consideration which each party receives under the compromise, being, not the sacrifice of the right, but the settlement of the dispute, and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only, and that the other had no right whatever."

There was clearly an ambiguity in the contract in respect to the use of nut locks in the construction of the road, as appears by the contract itself, and also by the statements of the Referee.

Ambiguity in an instrument not only furnishes ground for an honest dispute, but such dispute precludes the application of the rule that the payment by a debtor of a part of his liquidated debt is not a satisfaction of the whole.

Tuttle vs. Tuttle, 12 Metc. (53 Mass.), 557.
Storch vs. Dewey, 46 Pac. Rept., 698.

The allowance of an item or charge in an account through a mistake of law is as binding upon the party making it as is the voluntary payment of money under a mistake of law.

Elliott vs. Swartwout, 10 Peters, 137.
R. R. Co. vs. Soutter, 13 Wallace, 517, 524.
Bank vs. Daniel, 12 Peters, 32.
Birkhauser vs. Schmitt, 45 Wisconsin, 316.
Goodrich vs. Sanderson, 35 Apple. Divn., 546 (N. Y. Supreme Court, First Dept., 1898).

Clark certainly at the time of giving the acknowledgment of March 9, 1888, supposed that he was legally liable for the forfeiture, which legal liability he recognized and admitted by the instrument itself. To say that now, ten years afterwards, it has been adjudged and determined by the decision of the Referee and the Court that he was not, in law, so liable, only establishes that he made the allowance, which was equivalent to an acceptance of payment, under a mistake as to his legal right, which was then uncertain and in dispute. So, also, his legal right or liability in regard to the nut-locks was uncertain; and he admitted it, if, as it is now held, he was not chargeable for them, under a mistake of law as to his liability.

The Circuit Court of Appeals, it is submitted, applied the wrong rule in this case, and instead of seeking to find some ground to sustain the settlement made by the parties themselves years ago, and acquiesced in for so long a time before suit was brought, seems rather to have sought to find a want of consideration in order to overthrow it. As was said by LYON, J., in *Hoyt vs. McLaughlin (52 Wis., 283)*:

"The law favors settlements, and will not open or disturb them but for very cogent reasons."

And Chief-Justice MARSHALL, in *Chappedelaine vs. Dechenaux (4 Cranch., 309)*, said :

"No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony."

Harley vs. 11th Ward Bank, 76 N. Y., 618.
Kingsley vs. Melcher, 56 Hun, 547.

In *Kellogg vs. Richards (14 Wend.* [*N. Y.*], *119)* NELSON, J. (afterwards Justice of the U. S. Supreme Court), said :

"The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, *is technical, and not very well supported by reason.* Courts, therefore, have departed from it on slight distinctions."

Couldery vs. Bartrum, 19 Ch. Div., 394, states the same rule in England.

POTTER, J., in *Jaffray vs. Davis, 124 N.Y. 169* (1891), said that, while ruling that the acceptance of a smaller sum in payment of an admitted liquidated debt was not a satisfaction, courts

"*have rarely failed* upon any recurrence of the question, *to criticise and condemn its reasonableness, justice, fairness or honesty.*"

and in *Henson vs. Stever, 69 Mo. Applt. Rept., 136, 141*, ELLISON, J., said :

"Courts regard the rule preventing a creditor from making a valid contract to take a less sum of his debtor in discharge of a greater *as technical and unreasonable*, and they are eager to find some element in the transaction which can be held to be a consideration."

Applying these reasonable and equitable rules and

principles to the facts of this case, the Court should not find it difficult to sustain the settlement voluntarily, made between the parties, nor to find an ample consideration, not only in the unliquidated character of the plaintiff's claim as to the amount actually due to him, but in the allowance to him of the $34,598.90 for matters not fixed by the chief engineer's certificate.

The rule in the State of New York is the same. An early case, very similar to the present, is that of *Davenport vs. Wheeler, 7 Cowen, 231* (N. Y. Supreme Court, 1827), where the Court said :

" The defendants had stated an account and drawn a check for the balance, which the plaintiffs had accepted upon the footing of a balance stated, with the particulars in their possession, without objection for several months." " One offers and the other accepts a certain sum as the true balance. * * * It was paid and received as in full. To avoid this consequence the check should have been rejected ; or at least, notice given that it had been received only in part payment. The debt was unliquidated in its nature. But, by the acts of the parties, it was liquidated and paid. They ought not afterwards to be allowed to go into evidence upon it. The defendants had concluded themselves clearly by their accepted offer of compromise. The plaintiffs ought to be equally concluded. * * * After such a long silence especially " [which in this case was only a few months] " they should not be allowed to open the account."

It was held that the parties were by the transaction concluded as to the amount of the goods ; that it was equivalent to an *insimul computassent.*

In *The People vs. Board of Managers, &c. (96 N. Y., 640)*, plaintiff, who had certain claims for salary and services, &c., against the Buffalo Asylum which were adjusted and paid, gave a receipt which read : " I " hereby acknowledge this to be a receipt *in full of all* " *demands of every name and nature* which I have " against the asylum." He afterwards sued to recover damages for being discharged without cause, claiming that his hiring was for a longer term, *and also for certain extra work.* The Court said : " The instrument

" referred to, upon its face, shows that it was intended " to cover all claims and demands against the re- " spondent, and *prima facie* it is sufficient to discharge " such claims absolutely."

" The doctrine that the settlement of a debt for a less sum after a specific debt is due, in satisfaction of the debt, is not good by way of an accord and satisfaction, is only applicable where the existence of the debt, *and the amount thereof, is conceded*, and does not apply where the claim is disputed."

In *Green vs. Rochester Mfg. Co.* (1 N. Y. Supreme Ct., p. 6) the Court said : " The rule that the payment of " a less sum in satisfaction of a specific debt after the " debt is due does not extinguish the balance, has no " application to a case where *the amount claimed* by the " creditor is unliquidated and in dispute. In the latter " case, when a sum is offered and accepted in discharge " of all legal claim, and a receipt in full is demanded " and given, *the entire claim is discharged, though it* " *may be shown by the evidence that the creditor would* " *have been entitled to recover more than the amount he* " *received.*"

Citing *Palmerton vs. Huxford* (4 Denio, 166), and *Wilkinson vs. Byers* (1 Adol. & El., 106).

In *Looby vs. West Troy* (24 Hun, 78) the plaintiff's claim was upon a contract to furnish oil, &c., for the public lamps at a *certain fixed rate ;* which would seem to have made it a liquidated claim. The plaintiff sought to recover under the contract. The defendant offered to pay part of the amount claimed, and delivered to plaintiff a warrant to his order, expressed to be in full satisfaction, upon which he received payment, without giving any other receipt, and *stating that he would not accept it as payment.* It was nevertheless held to be a discharge and a bar to the recovery of the balance of his claim.

" Where a debtor offers a certain sum of money in full satisfaction of an unliquidated demand, and the creditor accepts and retains the money, *his claim is cancelled ; and no protest, declaration or denial on his part*, so long as the condition is insisted upon by the debtor, *can vary the result.*"

Fuller vs. Kemp, 138 N. Y., 231.

The Court further said in this case :

" It is of no significance that the remittance was by check. Both parties treated it as money, and the plaintiff had but a single alternative presented for his action, *the prompt restoration of the money to his debtor, or the complete extinguishment of the debt by its retention.*" (138 N. Y., 237)

" *The acceptance of the money involved the acceptance of the condition upon which it was paid, and the law will not permit any other inference to be drawn from the transaction.* Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest can affect the legal quality of his act."

" Where the debt is unliquidated and there is a *bona fide* disagreement *in regard to the extent of the debtor's liability*, the law will not permit the creditor to accept and retain money which has been tendered by way of compromise, and then successfully litigate with his debtor for the recovery of a greater sum."

Citing :

Hill vs. Sommer, 53 Hun, 392.
Preston vs. Grant, 34 Vt., 201.
Boston Rubber Co. vs. P. W. Co., 58 Vt., 551.

In *Hills vs. Sommer, 53 How., 392, 494 (N. Y. Supreme Court, 1889)*, the claim was to recover an agreed price upon a sale of merchandise. Defendant claimed a rebate because of defective quality, and sent plaintiff a draft for only the amount admitted to be due ; *held*, an accord and satisfaction.

Where a debtor sent to his creditor a check for a certain amount, in full of the amount which the debtor claimed was due to his creditor, although the creditor refused to accept the check in full payment, and claimed that more was due ; *held*, that, although the amount due might be larger than the amount of the check, yet that the creditor, by accepting and using the check, accepted it in full payment of the claim in dispute.

Reynolds vs. Lumber Co., 85 Hun, 470.

See, also,

Wahl vs. Barnum, 116 N. Y., 96.
Zoebish vs. Von Minden, 120 N. Y., 407.

In a recent and prominent case in the New York Court of Appeals, which is quite emphatic and conclusive as to the rule in that State *(Nassoiy vs. Tomlinson, 148 N. Y., 326, 1896)*, it was said: "*A demand is not liquidated even if it appears that something is due, unless it appears how much is due;*" and where it was admitted that one of two specific sums was due, and there was a genuine dispute as to which was the proper amount the demand is to be regarded as unliquidated.

"If, when the amount of an indebtedness is in dispute the debtor sends the creditor a check for the sum *conceded by the debtor to be due*, with an unsigned receipt '*in full*' and a letter requesting the signing and return of the voucher, *the offer of payment is to be deemed made upon the condition of its acceptance in satisfaction of the debt;* and, if the creditor retains the papers, and * * * endorses and collects the check, such acceptance of the check imports an election to be bound by the condition on which it was offered, *and constitutes an accord and satisfaction*, which will not be affected by the creditor's subsequently sending the debtor a receipt on account, unless such receipt is acquiesced in by the debtor."
(148 N. Y., 326.)

"As reflecting the intention of the parties, it is the same in effect as if the check had been written '*in full*,' as was the case in *Reynolds vs. Empire Lumber Co. (85 Hun, 170)*."

In *Nassoiy vs. Tomlinson (148 N. Y., 331)* the Court further said:

"The plaintiff cannot be permitted to assert that he did not understand that a sum of money offered in full was not, when accepted, a payment in full. As was said in *Hills vs. Sommer* (53 Hun, 392-4), he was 'bound either to reject' the check 'or, by accepting it, to accede to the defendant's terms.' The money tendered belonged to them, and they had the right to say on what condition it should be received. 'Always the manner of the tender and of the payment 'shall be directed by him that maketh the tender

'or payment, and not by him that accepteth it.' *(Pinnel's Case, 5 Co., 117)* The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition, for, if he accepted it at all, it was *cum onere*. When he endorsed and collected the check referred to in the letter asking him to sign the enclosed receipt in full, *it was the same, in legal effect, as if he had signed and returned the receipt*, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered. *The use of the check was ipso facto an acceptance of the condition.* The minds of the parties then met so as to constitute an accord, and, as was said by this Court in *Fuller vs. Kemp* (138 N. Y., 231), '*the acceptance of the money involved the acceptance of the condition, and the law will not permit any other inference from the transaction.*' "

In *Nassoiy vs. Tomlinson* the defendant paid only the amount which he admitted to be due in any event, and the creditor got only what he was entitled to anyhow, and not all which the Court afterwards determined was his due. It was a question of commissions. There was no dispute but that the plaintiff was entitled to commissions at, at least, the rate of one per cent., which was all that was paid. That was conceded to be due by the defendant, and that amount he paid, insisting that plaintiff must take it in full, which he refused to do. The Court or jury found that he was entitled to five per cent., the larger sum ; but, as the Court of Appeals said : " A demand is not liquidated, even if it appears that something is due, unless it appears *how much* is due."

A still more recent and more positive decision to the same effect, of the Appellate Division of the New York Supreme Court (First Department, Dec., 1898), has just been announced *(Goodrich vs. Sanderson, 35 App. Div., 546-562)*. Goodrich, as Receiver of the Union Warehouse Co., lessors to Sanderson of certain piers and dock property, brought suit against Sanderson to recover $3,103.32 balance claimed to be due for rent for the

month of July, 1894, the month's rent being fixed by the lease at $4,375, which made it a liquidated sum. Sanderson claimed certain deductions or offsets to the amount of $3,103.32 for repairs and being disturbed in his possession by certain work done in rebuilding by the lessors, &c. An account was stated between the parties, by which Sanderson was charged, "July 1, to rent of piers, Prentice Stores, month ending 31st inst., *as per lease*, $4,375," and was credited by, "Less deductions as agreed"—various items amounting to $3,103.32, leaving a balance of $1,271.68, for which a check was given by Sanderson and accepted by Goodrich as a payment in full. He gave no formal receipt, or did anything except sign his name as Receiver to the memorandam or statement of account. The company of which Goodrich was Receiver was itself lessee of the property from the Prentice estate, Sanderson being a sublessee, the leases containing similar covenants. Goodrich claimed the same deductions from the principal lessors on the rent for July as he had allowed to Sanderson, which they refused to make, and brought suit for the full amount of the rent, which they recovered, the Court holding that there was no valid claim for the deduction by either the Receiver or Sanderson. The Receiver, Goodrich, thereupon brought suit against Sanderson to recover the amount he had allowed in the settlement with Sanderson.

The suit was tried before a Referee in the State Court, who gave judgment for the defendant Sanderson, which was affirmed by the appellate court "on the opinion of the referee" which is printed as the opinion of the Court. *(35 Applt. Div., 547, 561)*

The Referee referred to the case of *Fuller vs. Kemp, 138 N. Y., 231;* and also to *Kellogg vs. Richards, 14 Wend., 116*, as holding that the fact that the payment was made by a negotiable instrument bearing endorsement would afford a consideration.

Among other things, the Referee in his opinion said:

"I am not satisfied whether the defendants had at any time a valid offset or counterclaim against the rent due under the lease for the interruption of their possession. They clearly had none under the covenant for quiet possession. * * *

"I am, however, satisfied that in negotiating for a settlement, the defendnts pressed their claim in good faith, and that it was conceded as a valid claim by the plaintiff in equally good faith, and the amount adjusted by the negotiation, the result of which both parties accepted.

"The receipt by the plaintiff of the defendants' check for the balance agreed upon as due, taken in connection with the statement of account which he signed, proves the meeting of the minds of the parties. *(p. 552)*

"It is further argued that the Sanderson's claim was admitted in full, and, therefore, that there was no dispute and no compromise, and that it follows that there was no accord" *(p. 553)*.

"Nor can I agree with the contention that there is no accord unless there is a compromise. I do not find any case so holding. It seems to me that the case of *Nassoiy vs. Tomlinson (148 N. Y., 326)* is inconsistent with such a proposition.

"It is obvious that there had been no compromise on the part of the delefendant. He had paid the exact amount admitted by him to be due.

"The plaintiff further urges that an offset is not the equivalent of a payment, and cites *Renard vs. Fiedler (3 Duer, 318)*. I do not think that that case draws any distinction between an erroneous payment of money and erroneous allowance of deduction.

"The weight of authority seems to be in favor of the proposition that a valid accord and satisfaction may be founded upon an untenable claim. *(Union Bank of Georgetown vs. Geary*, 5 Pet., 99, 114; *Pitkin vs. Noyes*, 48 N. H., 294; *Fisher vs. May's Heirs*, 2 Bibb [Ky.], 449; *35 Appl. Divn., 554-556)*

A similar ruling was made in *L'Estienne vs. Ernst (5 App. Divn., 373)* by the same Court (1896). See, also, *Lumber Co. vs. Brown (68 Vermont, 239); McDaniel vs. Lapham (21 Vt., 222); Preston vs. Grant (34 Vt., 201); Towsley vs. Healy (39 Vt., 522); Donahue vs.*

Woodbury (6 Cush. [Mass.], *148); Bull vs. Bull (43 Conn., 455); Palmer- ton vs. Huxford (4 Denio, 164),* and *Tanner vs. Merrill (65 N. W. R., 564).*

If the amount due to Clark by the railway company was liquidated, it was so liquidated at the sum of $213,532.49; since, as the Circuit Court of Appeals states, there was nothing to show that the statement of account and acknowledgment of satisfaction "fails in any way to *set forth accurately the agreement* entered into between the parties on that day."

If so, the amount then due by the company to Clark was liquidated by the agreement of the parties at $213,532.49; which was the amount which was paid.

If it was not liquidated at that sum then the amount due was not liquidated at all. Indeed, the plaintiff Clark claimed that the amount due to him was entirely unliquidated; since he claimed and sued to recover some $300,000 more as still due to him, notwithstanding the certificate and estimate of the Chief-Engineer, and in addition to the further sum of $34,598.90 which was allowed to him by the Railway Co. upon the settlement.

It is, we think, indisputable, that no one of the cases cited in the opinions of either of the Judges of the Circuit Court of Appeals, holds that a claim or demand is a liquidated one, where one side only of an account of mutual transactions and charges or credits is agreed upon and undisputed, if the amount of the offsets or charges on the other side, or any items of them, are in dispute; or where the balance due upon the whole account is in dispute and unliquidated, as it was in this case, unless it was liquidated at the sum stated in the account to be due at that time; or that the payment of the balance of an account found and determined by the mutual agreement of the parties themselves to be due upon a statement of claims of charges and credits upon either side by mutual concessions and allowances, is not a sufficient consideration to support

the settlement thus arrived at, although it afterwards be adjudged after a long litigation, instituted many years afterwards, that as to some of the items on one side of the account the party charged with them was not legally liable for them.

That is the status as to the facts of this case.

Decision as to Nut-Locks.

In the Referee's decision, after stating that there was no specific reference to nut-locks in the contract, he said:

"Soon after the contract began the defendant made a shipment of nut-locks to William W. Hegeman, who, as agent for the plaintiff, had control of the work done for Clark in building the road, for use in constructing the track, with a bill charging the amount of the shipment to Clark as paid by the company for Clark. Upon this *a controversy arose*, Hegeman denying for Clark that he was bound to supply nut-locks in building the road and the company insisting that he was.

"By common consent this question was adjourned for the time being and the road was built with nut-locks, which were from time to time received, placed in the track and credited upon the books of Clark by Hegeman to the company, but with the understanding that the claim of the defendant was not thereby admitted, but that its ultimate decision was postponed until after the completion of the work."

(Record, p. 62, fols. 184, 185.)

After again alluding to the fact that nut-locks do not come under any of the provisions of the contract, the Referee further said:

"The probability seems to me to be that in preparing this contract the subject was overlooked or forgotten by the chief engineer, but that, when the contract came to be executed, Kimball, the manager or superintendent of construction for the company, seeing the importance of their use, insisted upon their insertion in the contract, *whereupon a dispute arose*,

and it was agreed that they should be supplied by the company, and, in fact, used, the question between the parties as to who should pay for them being left in abeyance until the completion and construction of the road."

(Record, pp. 66, 67, fols. 198, 199.)

And also :

"So far the nut-locks are concerned, it is clear to me that they had been skipped or omitted, probably forgotten in the preparation of the original contract."

(Record, p. 81, fol. 242.)

The Referee further said that "the testimony in the case would leave the mind in doubt whether it was originally intended to require the payment for the nut-locks by the contractor or not," and that there was much conflict in the testimony, but that, considering the sixth section of the contract itself as controlling, he found there was no provision in it requiring Clark to furnish the nut-locks *(p. 71, fols. 212-13).*

The question of Clark's liability for the nut-locks was certainly a legitimate matter for dispute in good faith.

As to the $40,000 Forfeiture.

In the Referee's decision in regard to this matter, he stated :

"By the terms of the contract as modified before execution and noted in the testatum clause, the amount of money to be paid for the work to be done by Clark was $3,954,600. The defendant claims that by a supplemental agreement entered into between them, this provision was modified, so that if the railroad were not completed by the first of June, 1887, the forfeiture of a deduction of $40,000 from the contract price should be imposed upon the plaintiff; or, in other words, *that the contract price should be reduced by the sum of $40,000.*"

"The existence of any such supplemental contract is denied, but after much consideration of the testi-

mony on both sides, I believe the defendant to have established this proposition, and that there was such an agreement, under which the road was built, and that it was supported by a valuable consideration," *(Record, p. 71, 72; fols. 213, 214)*; and that it was in its essential nature liquidated damages, as it was intended to be. *(p. 81, fol. 243)*

In the Referee's formal findings the facts in regard to this supplemental agreement for the forfeiture and the explanation and reason of it were stated to be that when the contract was originally executed on behalf of the railway company by Roswell Miller, its then general manager at Milwaukee, the consideration expressed in it to be paid by the railway company was $3,914,600, or $40,000 less than the amount afterwards stated, which change was made when it was executed by Clark in New York, Mr. Miller, who executed it for the company, not being present; that when his attention was called to it he informed Mr. Clark that there was a misunderstanding in regard to the consideration; that the amount should be $3,914,600 if the date for the completion of the work was to be August 1, 1887, as stated in the contract, instead of June 1, 1887, as originally agreed upon; and thereupon, Clark agreed with the company that he would forfeit $40,000 if the road was not completed by June 1, 1887, instead of August 1, 1887, the date stated in the contract; and that the work was not commenced until that agreement was made.

(Record, p. 120, 121; fol. 359-362.)

Thus the true consideration which had originally been agreed upon, of $3,914,600, was changed to one of $3,954,600, with an agreed forfeiture of $40,000 if the work was not completed by June 1, 1887, instead of August 1, 1887.

The Referee further found that a certain crossing of the railroad built under the contract, with the line of the Hannibal and St. Joseph R. R. Co., at a place

called Minnaville, had not been procured or arranged for prior to October 27, 1887, and that the railroad could not, therefore, have been completed by the plaintiff Clark by June first, 1887; and as to this, he said:

"However blameworthy he may have been for other delays, he is not responsible in law for not having built this crossing sooner, and therefore not liable to the forfeiture of $40,000 for not completing the road in June."

(Record, p. 75, fol. 224.)

The road, however, was not fully completed or accepted by the company until March, 1888.

As to the Receipt or Acknowledgment of March 9, 1888.

In regard to this, the Referee in his decision said:

"This receipt was sent to Clark by Vice-President Bond with the information that upon its signature and return to him, a check would be delivered to Clark for the sum of $173,532.49. Clark signed the receipt, and at a later hour during the day received a check, and thus, as far as he could legally bind himself for the consideration recited in this paper, Mr. Clark accepted the sum of $173,532.49 as in full, except as to the sum of $40,000 reserved to meet his guarantee recited in the receipt, and as far as his agreement and signature could give it force, agreed, and accepted these amounts as establishing, that he had no claim for nut locks, and had credited the company with $40,000 because of the non-completion of the railroad by the first of June, 1887."

(Record, p. 80, fols. 238, 239.)

He also said:

"I dismiss as of no value in this consideration the claims that Clark signed this receipt improvidently and without due consideration. He is bound by it, so far as he could legally bind himself from retraction, quite

as much as if he had taken days for its consideration, been advised by counsel, and was under no pecuniary stress pressing to accept a smaller sum than was due."
(Record, p. 80, fol. 240.)

And as the Circuit Court of Appeals said, per Mr. Justice LACOMBE, there was nothing in the findings to show "*that it fails in any way to set forth accurately the agreement entered into between the parties.*"
(Record, p. 518.)

By the decision of the Circuit Court of Appeals, that there was no consideration for the agreement, evidenced by the acknowledgment of satisfaction of March 9, 1888, executed and delivered by Clark, because the railway company paid to Clark only the amount which it admitted to be due to him in any event, after deducting the disputed items which it had charged against him, it held, in effect, that although the two items of charges for nut-locks and time forfeiture were in dispute and were, therefore, unliquidated, and although they were embraced in the settlement, there was no consideration to Clark for waiving or releasing them, in the payment of $173,532.49, for the reason that that amount was due to him anyway; and that, therefore, he received no additional consideration for the release of those claims; and that the railway company parted with nothing which it was not obligated to pay.

The Court held that the certificate or final estimate of the chief engineer of the railway company, fixing the amount which Clark had earned for all work done by him under the contract, including all extra work, less work which he did not perform, at $3,895,798.79, liquidated the amount which was due him at that sum; and that there was nothing to show that the sum of $34,598.90, which was credited to him in the statement of account which preceded and was included in and made a part of the acknowledgment, "for materials

sold by him to said company, certain rebates and other matters of that description," had not already been agreed upon and liquidated by the parties, making the total amount at which the plaintiff Clark's claim was liquidated to be $3,930,397.69.

But there is no finding of fact that that sum of $34,598.90 had been so liquidated by the parties prior to the execution of the agreement of October 9, 1888, by any formal or binding agreement between them, or otherwise than by the statement of it as a credit to Clark in the account and acknowledgment itself, as part of the general settlement.

If the statement of account and acknowledgment itself liquidated the whole amount with which Clark was entitled to be credited at $3,930,397.69, it also necessarily liquidated the amount with which he was chargeable at $3,716,865.20, including the amount of the charge for nut locks, $9,558.63, and the $40,000 forfeiture, and likewise liquidated the balance which was then due to him at the sum of $213,532.49, of which $173,532.49 was then paid to him in cash, and the $40,000 reserved to meet certain claims which was afterwards paid out, and more too, as found by the Referee and the Court.

(Record, p. 116, fol. 346, p. 136, fol. 406.)

In the opinion of Mr. Justice LACOMBE, in the Circuit Court of Appeals, it is said in regard to the sum of $34,598.90, which was credited to Clark for materials sold by him to the company, &c., in the statement of account forming part of the acknowledgment of March 9, 1888, which was not included in the Chief-Engineer's estimate as for any part of the work done by Clark under the contract as follows:

"This sum is by the statement of account set forth in such receipt credited to Clark, and is included in the $173,532.40 paid to him upon his signing such receipt. From what has been said before, it is plain that, if at the time of the transactions relied upon as showing an accord and satisfaction this sum of $34,598.90 so

allowed to Clark represented an unliquidated item, the amount of which he would have to establish by evidence in case he had sued to recover it, its allowance to him upon the settlement of March 9, 1888, would be a sufficient consideration to uphold that settlement against him as an accord and satisfaction of all his claims."

(Record, p. 532.)

"From the Engineer's certificate, which is included in the findings, it appears that this item represented no part of the work specified under the contract, and no part of the extra work and materials ordered by him; that it was not included in his certificate, nor in the final estimate, that he made no decision about it one way or the other, and apparently that he never undertook to pass upon it. *Therefore it was not liquidated by the original contract, nor by any action of the Chief Engineer thereunder.* Indeed, it is plain to a demonstration from the findings, that the item in question was not included either in the original contract or in the extra work, and must represent an additional and independent contract of sale. What the terms of that contract of sale were, the findings do not disclose; if they were of such a character as to leave the price of the articles sold open to future adjustment, and if no binding agreement of the parties had subsequently adjusted such price; in other words, if, on March 9, 1888, the situation was such that the plaintiff, put to his suit, could have recovered this item only by proof of amount furnished or of reasonable value, or of both, then it was an unliquidated item, and its allowance to the plaintiff on the settlement would be a good consideration to support the contract of accord and satisfaction."

(Record, pp. 532, 533.)

There is no finding whatever that said amount of $34,598.90 had ever been agreed upon or liquidated by the parties by any formal agreement between them which would entitle the plaintiff Clark to recover that amount from the railway company, as an independent item, or "in such a way as to preclude further litigation in good faith, or with any color of right," or otherwise than "by some mere expression of willing-

ness to pay that particular amount," or otherwise than by the statement of it in the account preceding and which formed a part of the receipt and acknowledgment of satisfaction; nor that the Company would have allowed that credit to Clark except as an item in the account in which he should likewise allow credit to the R. R. Co. for the amount of the charge for the nut locks and forfeiture.

The learned Judge, however, seems to hold that because of the finding of the Referee

"that said receipt and paper contained an accurate, truthful and *undisputed* account of all dealings between said parties, except in the matter of the $40,000 deducted for time forfeiture and the $9,558.63 for nut-locks," he must assume that the Referee was "satisfied from the testimony that the prior transactions between the parties were such that this sum was no more open to dispute than was the sum of $3,895,798.79 to which the Chief Engineer had certified. By what process it was so liquidated does not appear in the findings."
(Record, p. 533.)

The decision of the Court is, therefore, apparently made to turn and depend upon inferences drawn from the use of a single word in the Referee's findings, viz.: that the account stated in the receipt or acknowledgment was "undisputed," except as to two items.

The learned Justice thereupon concludes that he must, therefore, "*assume* that either by agreeing for a price in advance, or subsequently, by entering into some binding agreement as to the sum to be paid," the Co. had lost its right to throw the plaintiff into court as to that item, and that its allowance and payment, therefore, could not constitute a good consideration for the alleged accord and satisfaction."
(Record, p. 534.)

It would, therefore, appear that the Court was obliged *to assume* that there had been a previous binding agreement between the parties as to this matter, which neither party could question, in order to make

out a liquidated claim in favor of Clark for this sum of $34,598.90; when, as a matter of fact, there are, it is submitted, no findings of fact to sustain any such assumption or conclusion; and it is only by *assuming* that the Referee was satisfied in regard to certain matters which were necessary to be found to exist in order to make the plaintiff's claim a liquidated one, concerning which there is no finding of fact whatever, that the claim could be considered to be liquidated, independently by itself, or otherwise than as part of a general settlement.

On the contrary, it is respectfully submitted that there were findings, both of fact and of law, made by the Referee which are not referred to by the learned Justice, and which have apparently been overlooked, which negative the assumption that the item of $34,598.90 had been agreed upon or settled by or between the parties prior to the statement of account contained in the instrument of March 9, 1888.

The Referee made the following findings, which are not mentioned or referred to in either of the opinions of the Honorable Judges of the Circuit Court of Appeals:

"16. That no other final settlement of the accounts under said contract had been had between the plaintiff and the defendant at the time that the said last-mentioned paper was signed and delivered."

(Record, p. 116, fol. 347.)

"18. That no account was ever, otherwise than by said paper and the receipt of said money, stated of the transactions under and connected with said contract between the plaintiff and the defendant."

(Record, p. 117, fol. 349.)

And conclusion of law No. 9:

"That no account of the transactions under this contract, *and of the claims sued on in this action*, was ever had or stated between the parties to this action otherwise than by said receipt or paper of March 9, 1888."

(Record, p. 119, fol. 356.)

It is quite apparent, therefore, that if no other final settlement of the accounts under the contract had been had between the parties at the time the acknowledgment of March 9, 1888, was signed and delivered, and no account was ever otherwise than by said paper and the receipt of said moneys stated of the transactions under *and connected with said contract*, and no other account of the transactions under the contract, *and of the claims sued on in this action*, was ever had or stated between the parties otherwise than by said receipt or paper of March 9, 1888, there could not have been any prior adjustment, agreement, statement of account, or final settlement of the accounts between the parties as to said matter of $34,598.90, except as contained in said statement of account which was included in the instrument of March 9, 1888, as part of the settlement as a whole.

The said amount certainly related to transactions *connected with* said contract, and to the claims sued on in the action, as the suit was brought to recover that amount in part, and that sum was an item in and part of the account stated in the acknowledgment, and was included in the sum of $173,532.49 paid to Clark upon the signing of the receipt, as stated by his Honor Mr. Justice LACOMBE.

(Record, p. 532.)

It is also submitted that in the opinions of the two Judges who sat in the Circuit Court of Appeals it appears that while they agreed in the result they did not concur in the grounds of their decision.

Mr. JUSTICE LACOMBE bases his conclusion that the $34,598.90 was a liquidated claim in favor of Clark, upon the finding of the Referee that the receipt and paper contained an accurate *and undisputed* account of all dealings between the parties except in the matter of the forfeiture and the nut-locks ; from which he concluded that it must be assumed that that matter was not open to dispute ; while the learned senior Justice held that the statement of account rendered

by the defendant was evidence as against the defendant not only that it was an undisputed demand, but one the amount of which had been ascertained by the parties; and that, as no facts appeared in the findings of the Referee to the contrary, it is to be concluded that that part of the plaintiff's demand was liquidated as well as undisputed. *(Record, pp. 539, 540)*

His Honor Mr. Justice WALLACE, in his opinion, says:

"The case is not precisely one where the debtor refuses to pay the whole of an undisputed and liquidated demand, and exacts a promise from his creditor to receive part in satisfaction of the whole. Strictly, it is one where the creditor, having two undisputed and liquidated demands against the debtor, and the latter, claiming to have cross-demands or counterclaims against the creditor, refuses to pay the creditor's demands unless the validity of the cross-demands is acknowledged and their amount allowed to him by the creditor" *(p. 540)*.

He further said:

"The authorities are not altogether in accord upon the question whether in order that there may exist a valid consideration for a compromise both parties must concur in supposing the demand to be doubtful in point of right or amount, or whether it suffices if the claimant only entertains this belief and honestly supposes that he has a valid demand." "*It is well settled that there is a sufficient consideration when both parties regard the demand as possibly capable of enforcement.*" In *Union Bank of Georgetown vs. Geary* (5 Peters, 99) the Court said: "It is enough that the bank considered it a doubtful question; and that they supposed they were getting some benefit by foreclosing all inquiry on the subject; and the complainant by precluding herself from setting up the defense waived what she supposed might have been of some material benefit to her." See, also, *Callisher vs. Bischoffshein (L. R., 5 Q. B. 549), Keefe vs. Vogle (36 Iowa, 87), Flannigan vs. Kilcome (58 N. H., 443), Clark vs. Turnbull (47 N. J. L., 265), Connecticut River Lumber Co. vs. Brown (68 Vt., 239), Wahl vs. Barnum (116 N. Y., 87), McKinley vs. Watkins (13 Ill., 140).*"

There was nothing whatever in the present case to show that both parties did not regard the company's demands as possibly capable of enforcement. The railway company certainly so regarded them, and, more, it insisted that they were valid and enforceable, and Clark, by signing the acknowledgment, if not antecedently, not only conceded that they were probably capable of enforcement, but admitted that they were valid claims.

If the statement of account contained in the acknowledgment, not signed by the company at all, but only by Clark, made the account of credits to Clark, or charges against the company, liquidated sums, it certainly, if it did not absolutely liquidate the amount of the charges against him, showed that he considered such charges to be capable of enforcement, as he agreed that they were.

As Mr. Justice LACOMBE said in his opinion, it was not intended to hold

"that there was any bad faith on the part of the company in advancing these claims for the nut-locks and overtime penalty, *both items were legitimate matters of dispute*, and unless settled by agreement of the parties *might fairly be brought by either party into Court.*" *(p. 517.)*

And *Mr. Justice* WALLACE said that a demand was a disputed one, within the meaning of the rule as to liquidation, when it is so far disputable as to present a "proper case for litigation." (Citing: *Tuttle vs. Tuttle, 53 Mass., 551; Zoebish vs. Von Winden, 120 N. Y., 406; Honeyman vs. Jarvis, 79 Ill., 318*) (Record, p. 539)

The conditions, therefore, which Mr. Justice WALLACE held, would, if existing, constitute "a sufficient consideration," Mr. Justice LACOMBE says existed; or, at least, he says it was not intended to hold that they did not exist, that there was not any bad faith on the part of the company in advancing the claims for the forfeiture and nut-locks; that both items were legi-

timate matters of dispute, which might fairly be brought by either party into Court.

In Conclusion.

THE WRIT OF CERTIORARI SHOULD BE ISSUED IN THIS CASE FOR THE FOLLOWING REASONS :

The decision of the Circuit Court of Appeals in the case is so inconsistent with and contrary to the effect of the decisions of the U. S. Supreme Court in the cases hereinbefore alluded to, and also to the decisions of the Courts of the State of New York, and other States referred to, as to the payment and acknowledgment of such a settlement and acquittance as was made and given in this case, as a payment in full, and release of a large claim, that this Court ought to require the whole case to be brought before it for review, in order that it may be determined by the Supreme Court what is the true rule of decision to be applied to the facts found by the Referee and the Circuit Court in the case below, in respect to which the Circuit Court of Appeals has, it is submitted, applied the wrong rule, by seeking to overthrow the settlement, instead of sustaining it; and that the conflict of decisions in this case and in the cases hereinbefore referred to may be settled; and this especially in view of the fact that the decision of the Circuit Court of Appeals was made by a Court consisting of only two Judges who differ in their views and as to the methods by which they arrive at their conclusions; and that the case is an important one, both as to the amount involved, and the questions presented by the record which are solely questions of law.

All of which is respectfully submitted.

BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for Petitioners.

GEORGE R. PECK,
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Counsel.

No. 256.

Office Supreme Court
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JAMES H. McKENNEY,
Cl

Brf. of Hanson & Peck for Pet

Supreme Court of the United States.

Filed April 11, 1900.

OCTOBER TERM, A. D. 1899.

No. 256.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

HEMAN CLARK,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITIONER'S BRIEF AND ARGUMENT.

BURTON HANSON,
Attorney for Petitioner.

GEO. R. PECK,
Of Counsel.

Monitor Printing Company, 1533 West Lake Street, Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 256.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner,*

vs.

HEMAN CLARK, *Respondent.*

Petitioner's Brief and Argument.

STATEMENT OF THE CASE.

Succinctly stated, the case presented by the record is this: In the years 1886, 1887, and 1888, the respondent Heman Clark, constructed some two hundred miles of railroad in the States of Iowa and Missouri for the petitioner, Chicago, Milwaukee & St. Paul Railway Company, under a written contract dated March 6, 1886. (The contract is printed in full, Rec. pp. 146-188.) During the period of construction the company paid Clark large sums in money on account. After the road was completed Clark and the company came

together for a final settlement. As stated by the referee by whom the case was heard originally: "The road was fully completed and ready for operation in the winter of 1887-1888, and in February 1888, *the parties endeavored, by their representatives, to adjust and ascertain the* EXACT AMOUNT REMAINING DUE TO CLARK, *with the result of differences of opinion, however, which ultimately led to this suit.*" (Record p. 51.) The chief engineer of the company, as was his duty, under the contract, certified to the total amount which Clark had *earned* under the contract. This amount was $3,895,798.79. (*Twentieth and Twenty-first findings*, Rec., pp. 196-202.) The dispute between Clark and the company, did not arise over the *amount earned* by Clark, but over the *amount that should be credited to the company*, the company claiming credits to the amount of $3,716,-865.20, while Clark contended that the total amount which should be credited was $3,667,306.59, or $49,558.63 less than the amount claimed by the company. This amount was made up of two items; one of $40,000 for overtime forfeiture or penalty, and the other of $9,558.63, the amount paid by the company for nut-locks furnished to Clark and used by him in the construction of the road. That these items were in dispute is found by findings of fact, conceded by opposing counsel in their argument in the court below, and by the judges who wrote the opinions in the Circuit Court of Appeals. Judge LACOMBE, who wrote the principal opinion, in considering this feature of the case says:

> "It is not understood, however, that the referee has held, nor is it intended in this opinion to hold that there was any bad faith on the part of the company in advancing *these claims for the nut-locks and overtime penalty;* **both items were legitimate matters of dispute, and unless settled by agreement of parties, might fairly be brought by either party into court.**" (Rec., p. 517.)

This dispute finally culminated in the company preparing a statement of the account between it and Clark as it claimed the same to be. Appended to this statement of account was a release for Clark to sign, if he accepted the balance therein stated, to be due him in full of all demands. The account and release were sent to him with notice that upon signing and returning the same to the vice-president of the company, a check for the balance shown by the account to be due would be sent to him. In due time the account and release were returned by Clark to the vice-president of the company, signed and witnessed, and immediately a check for the full amount of such balance to-wit: $173,532.49 was sent to Clark, who received it, deposited it in his bank--received the proceeds thereof which he has ever since retained, and has never offered to return.

The statement of account and release are as follows:

STATEMENT OF ACCOUNT, RECEIPT AND ACKNOWLEDGMENT OF MARCH 9, 1888.

Whereas, a final estimate has been made by D. J. Whittemore, chief engineer of the Chicago, Milwaukee & St. Paul Railway Company, of all the work done and material furnished under the contract made between said railway company and Heman Clark, bearing date March 6, 1886, for the construction of the railroad from Ottumwa, in Iowa, to the Missouri river, including all extra work performed and material furnished of every kind and description, which estimate, with the prior monthly estimates, less deductions made for work not done and work assumed by said company, amounts to	$3,895,798.79
And, whereas, the further sum of ..... should be credited to said Heman Clark for	34,598.90

materials sold by him to said company, and certain rebates and other matters of that description, making, with the amount of said estimates, the sum of..... 3,930,397.69

And, whereas, the said Chicago, Milwaukee & St. Paul Railway Company has paid the said Clark to apply on said contract, in money, material, labor and transportation, the sum of..... 3,626,865.20

And. whereas, by the terms of Section 4, Article 13, of said contract, said Clark was to be charged, in addition for the transportation, the sum of 50,000.00

And by a supplemental contract was to allow the said railway company, by way of forfeiture in case said railway was not completed by the first day of June, 1887, the further sum of..... 40,000.00

Making the amount paid on said contract, together with the allowance of said transportation, and the allowance of said forfeiture, the sum of..... 3,716,865.20

Leaving the amount still due said Clark on said contract the sum of..... 213,532.49

And, whereas, in and by said contract it was provided that the said Heman Clark, party of the first part, should save the said railway company free and harmless from all claims that might be made against said railway company for liens of workmen and claims of sub-contractors, and from all damage arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle or other domestic animals killed or injured, and from all damages suffered by said sub-contractors and employees while engaged upon said work, of which said class of claims about..... 40,000.00

In amount have been made upon and are now pending in courts, by divers claimants against the said railway company, and the sum of.....	40,000.00
Of the amount so due as aforesaid under the said contract to the said Heman Clark has been reserved and set aside by said railway company as indemnity or security for the payment of said claims and of such other claims of the same class as may hereafter be made, in case said claimants, or any of them, recover judgments against said railway company; and the said..... ...	40,000.00
Or the balance thereof after paying and settling such claims as may be established against said railway company, is to be paid over to the said Heman Clark as soon as said claims are satisfied or said railway company suitably indemnified from any loss on account of the same, which.....	40,000.00
deducted from the said sum of.....	213,532.49..
So as aforesaid due said Clark, leaves due and owing by said railway company, and now payable on said contract to said Heman Clark, the sum of.....	173,532.49

Now, therefore, be it known, that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee & St. Paul Railway Company the sum of one hundred and seventy-three thousand five hundred and thirty-two and 49/100 dollars ($173,532.49), in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said railway company to account for said forty thousand dollars as hereinabove provided.

(Signed) HEMAN CLARK.

WM. C. EDWARDS.

(*Thirteenth finding*, Rec., pp. 113-115; *also findings on* pages 78, 79, 80 of Record.)

Judge LACOMBE in speaking of the execution of this release, says:

"*There is nothing in the findings to show that plaintiff "signed this receipt improvidently or without due considera-"tion, nor that it fails in any way to set forth accurately "the agreement entered into between the parties on that day, "nor that the plaintiff was under any pecuniary stress press-"ing him to accept a smaller sum than was due.*" (Rec., p. 518.)

Five years and six months after the execution and delivery of this release and the payment of the $173,532.49, Clark brought this action, not to set aside the settlement, but to recover over $305,900 claimed to be due him on account of the construction of the railroad, and for extra work and other claims growing out of the contract. He ignored the settlement entirely, and treated the $173,532.49 as a payment on account and not as a full satisfaction of all claims and demands arising or growing out of the contract and the construction of the road, as the release which he signed and delivered to the company states it was. Included in this $305,900 were the two items of $40,000 for overtime penalty and $9,558.63 for nut-locks which were part of and embraced within the account which was settled. The result, so far, of this litigation is that Clark has recovered on the two items of $40,000 and $9,558.63 and failed on the balance of his demands, excepting a recovery of a small amount, $2,425, a matter arising subsequent to the settlement and, therefore, not included within it.

The ground upon which the court below based its judgment, as appears by the opinions of Judges WALLACE and LACOMBE, is that the company, by the statement of account which it rendered Clark, conceded that it owed him the

sum of $173,532.49, and the items comprising the $49,558.63 being in dispute between them, the payment and acceptance of the sum of $173,532.49 in full satisfaction of all claims and demands constituted no consideration for the settlement or compromise of that dispute. In other words, the proposition is this: If two items of an account are in dispute, and a certain amount is paid and received on condition that it is in full settlement of the account, if it afterwards turns out that the amount so paid but equals the amount due on the undisputed items of the account, such payment constitutes no defense to an action to recover the amount of such disputed items. And this, notwithstanding, neither fraud nor mistake intervened, and both parties intended by the settlement to include within it such disputed items. The company contends that the account between it and Clark of matters arising out of the construction of the railroad was an entire thing, that the items of $40,000 and $9,558.63 being part of that account and in dispute, the balance due on the account was necessarily in dispute, and, therefore, the account as a whole was unliquidated; and such being the case the payment of the sum of $173,532.49 on condition that it should be received in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of the contract and of the construction of the railroad was a good and sufficient consideration for the settlement of the account as a whole; that neither the company nor Clark intended to make a partial or piecemeal settlement of the accounts between them; but on the contrary, both parties treated the accounts as an entirety and settled them as such. The instrument of settlement sufficiently proves this. And further: In the settlement the company allowed Clark $34,598.90 *in addition to the amount earned under the con-*

tract, for material which was left over on the completion of the road and for rebates and other matters of that description as shown by the statement of account upon which the settlement was made. This allowance was for a matter entirely outside the contract and was not included in the final or any estimate made by the chief engineer (Ninth Finding, Rec., pp. 127-135.) This allowance, the company contends, was a sufficient consideration to support the settlement independently of the dispute over the two items of $40.000 for overtime penalty and $9,558.63 for nut-locks and the payment of $173,532.49.

This action was originally brought in the State Court. On the application of the company it was removed into the Federal Court on the ground of the diversity of citizenship of the parties. After issue was joined the cause was referred to Hon. George Hoadly as referee. In due time he made his report and findings to the court; whereupon and on the 6th day of April, 1898, the cause came on for trial at a regular term of the Circuit Court of United States for the Southern District of New York, the Hon. Addison Brown, district judge, presiding. *Trial by jury was waived by written consent of the parties, filed with the clerk.* (*Rec., p. 22.*) *The court adopted the findings of fact of the referee and made them its findings of fact and ordered judgment thereon for the sum of $80,479.35.* (Rec., p. 224.) This judgment was affirmed by the Circuit Court of Appeals. The items composing the judgment are as follows:

1. $40,000 for overtime penalty allowed the company in the settlement.

2. $9,558.63 for nut-locks allowed the company in the settlement.

3. $2,425 for bridge timber alleged to have been appropriated by the company after the settlement was made.

4. $29,017.47 for interest and costs, less $521.75, the amount of company's counter-claim (*10th conclusion of law;* Rec., p, 119.)

Originally the complaint contained three causes of action (Rec., pp. 4-7), but by amendment the number was increased to six. (Rec., pp. 32-37.)

First Cause of Action.

By this cause of action it was sought to recover the sum of $71,057.63, the balance alleged to be due on the accounts arising under the contract for the construction of the road. This amount was made up of the following items:

1.	For nut-locks charged to Clark and included in the credit of $3,626,865.20 allowed the company in the settlement of March 9, 1888	$ 9,558.63
2.	For amount overtime penalty or forfeiture allowed the company in the settlement.	40,000.00
3.	For money paid by the company to subcontractors under Clark and for death of brakeman during the construction of road out of the $40,000 withheld as indemnity, as provided in the instrument of settlement	21,499.00
	Total	$71,051.63

Second Cause of Action.

By this cause of action it was sought to recover the sum of $232,705.66 for work done and material furnished in excess of that required by the contract.

THIRD CAUSE OF ACTION.

By this cause of action it was sought to recover the sum of $2,196 for damages alleged to have been sustained by reason of the alleged failure of the company to procure certain rights of way in time for the proper performance of the contract.

FOURTH CAUSE OF ACTION.

By this cause of action it was sought to recover the sum of $140,460.16, alleged to have been the amount in value of the materials furnished and work performed in excess of that which it is alleged the company represented would be required at the time the contract was entered into.

FIFTH CAUSE OF ACTION.

By this cause of action it was sought to recover the sum of $2,425, the value of certain bridge timber which it is alleged the company wrongfully converted to its use in June, 1888, *three months* after the aforesaid settlement was made.

Note: This cause of action, which sounds in *tort*, was allowed against defendant's objection at the close of plaintiff's case. (Rec., pp. 280-282.)

SIXTH CAUSE OF ACTION.

By this cause of action it was sought to recover the sum of $89,833.33 for embankment and piling furnished in excess of that required by the contract for the construction of the road.

By the findings and the judgment entered thereon, the second, third, fourth and sixth causes of action and the third item, $21,499 of the first cause of action, are wholly eliminated from the case, leaving for consideration the two items of $9,558.63 for nut-locks and

$40,000 for over-time penalty, embraced within the first cause of action, and $2,425 claimed by the fifth cause of action.

As to the items of $9,558.63 and $40,000, the contention of the company is, that they having been included in the settlement of March 9, 1888, such settlement is a complete bar to a further recovery. As to the item of $2,425 claimed in the fifth cause of action for bridge timber, alleged to have been wrongfully appropriated, the company denies having taken or appropriated it, and there is no evidence—not even a scintilla—in the record which in any manner sustains the allegations of the complaint or the findings of the court, and that this cause of action, which sounds in *tort*, is improperly united with the remaining causes of action which are based upon contract, and having properly and timely excepted thereto, the court erred in entering judgment thereon in favor of Clark. (Rec, pp. 280-282)

As the trial was had before the court without a jury, trial by jury having been expressly waived by written consent of the parties, filed with the clerk (Rec., p. 221), and the court having adopted the findings and conclusions of the referee and made them its findings of fact and conclusions of law, the questions which arise upon the record are:

1. **Do the findings of fact support the judgment as to the items of $9,558.63 for nut-locks, and $40,000 for overtime penalty?**

2. **Is there any legal evidence in the record to support the findings and the judgment entered thereon as to the item of $2,425 for bridge timber alleged to have**

been wrongfully converted by the company in June, 1888?

3. **Whether, in an action on contract, the complaint may be amended on the trial against the objection of the defendant by adding thereto a cause of action in tort and a recovery allowed on such additional count?**

The first of these questions is raised by the findings themselves, the exception to the ruling of the court in refusing to order judgment for the defendant and in ordering judgment for the plaintiff (Rec., pp. 222, 223, 224 & 226-229), and by the several assignments of error, particularly the *sixth*, *seventh*, *eighth*, *ninth* and *eleventh* assignments of error. (Rec., p. 479), and the *thirty-sixth* and *thirty-seventh* assignments of error (Rec., p. 488).

The second of these questions is raised by the refusal to find, as requested, that the defendant did not in the month of June, 1888, or at any other time, wrongfully or otherwise take possession of any timber belonging to the plaintiff, or convert the same to its use for the purposes of repairing a washout or otherwise. (*Request No. 37*, Rec., p. 211) the exception thereto (*Exception No. 27*, Rec., p. 263, *also Exception No. 17*, Rec., p. 456), and the several assignments of error, particularly the *seventy-fourth* assignment of error. (Rec., p. 501.)

NOTE: These exceptions and assignment of error were based expressly upon the ground that there was no proof in the case to sustain the findings that the defendant wrongfully or otherwise took or appropriated the timber in question.

The remaining of these questions is raised by the motion made at the close of the plaintiff's case to amend his complaint (Rec., p. 280), the objection thereto (Rec., p. 282), the overruling thereof (Rec., p. 284), the exception thereto

(Rec., p. 285), the motion for arrest of judgment, the denial thereof and the exception thereto (Rec., pp. 225-226), and by the *sixteenth*, *seventeenth* and *eighteenth* assignments of error. (Rec., pp. 481-482.)

FINDINGS OF FACT.

1.

That in the month of March, 1886, the defendant, the Chicago, Milwaukee & St. Paul Railway Company, made and entered into a contract in writing with the plaintiff, dated the 6th day of March, 1886, for the construction of a line of railroad from a point in the city of Ottumwa, Iowa, to a place called Harlem Station, in the State of Missouri, a distance of about 202.8 miles, to be completed on the first day of August, 1887, a copy of which contract is hereto annexed marked "A." (It is contained in the fourth of the defendant's last requests to find, *between pages 147 and 187 of the Record.*)

2.

That immediately after the execution of the said contract the plaintiff proceeded to carry out and perform the same, and did carry out and perform the same, except a portion thereof otherwise agreed between the parties, and substantially completed the same on or about the 1st day of November, 1887, and the same was duly accepted by the defendant on or about the first part of March, 1888.

3.

That on or about the 3rd day of March, 1888, the chief engineer in charge of the said work under said contract made a final certificate and estimate, which is copied in full in the 20th and 21st findings of fact last asked by the defendant, and by this reference is made part thereof. (Rec., pp. 196-202.)

4.

That said certificate and estimate were delivered to the defendant, but were never delivered to the plaintiff or any

of his agents and were not seen by the plaintiff or any of his agents or brought to his knowledge otherwise than by the reference thereto in the receipt of March 9, 1888, hereinafter referred to, until the trial of this action.

5.

That the consideration for the performance of said contract originally mentioned in said contract was $3,914,600, but before the execution of said contract by the plaintiff, by and with the consent of the defendant, the consideration was changed and made $3,954,600.

6.

That the plaintiff made and entered into a supplemental contract whereby he agreed with the defendant to complete his performance of said contract on or before June 1, 1887, and to allow the said defendant, by way of forfeiture, in case the said railway was not so completed by the 1st of June, 1887, the sum of $40,000.

7.

That the defendant failed to furnish the plaintiff with rights of way, as by said contract it had agreed to do in time to enable the plaintiff to complete his contract, prior to the 1st of June, 1887, or prior to the 1st of August, 1887, but on the contrary, delayed the plaintiff in the performance of said contract, at a point upon the said road known as Minneville, until October 27, 1887, by reason of the neglect, failure and omission of the defendant to obtain the necessary right-of-way at said point so as to permit the construction of the road and completion of the contract at said point.

8.

That the plaintiff was thereby prevented from completing his contract on or prior to August 1, 1887, and also on or prior to June 1, 1887, by the negligence, omission and fault of the defendant.

9.

That during the progress of the work the defendant purchased and furnished to the plaintiff and charged him for patented nut-locks for which the defendant paid $9,558.63.

10.

That the said nut-locks so furnished by the defendant were used by the plaintiff in the construction of the road.

11.

That there are no provisions in the contract which require that the plaintiff, and the plaintiff never agreed that he should use, in the construction of the railroad under said contract, any patented nut-locks.

12.

That the plaintiff was ordered by the defendant to put such nut-locks on the road at the beginning of the work. That he protested against their use, and finally yielded and used them in track laying upon the promise that the matter of the charge for said nut-locks should be adjusted after the completion of the contract.

13.

That upon the 9th day of March, 1888, the plaintiff signed and caused to be delivered to a representative of the defendant a paper, writing or receipt presented to him by the defendant for signature, of which the following is a copy; and upon the signature thereof by said Clark, and its delivery by him to the defendant, the plaintiff was paid by the said defendant the said sum named therein of $213,532.49, *less the sum of $40,000 claimed in said paper to be retained for forfeiture in not completing performance of his work under said contract on or prior to June 1, 1887.* *

And the sum of $3,626,865.20 included therein embraces said sum of $9,558.63 claimed by defendant to be due or nut-locks. Said $40,000 was deducted, and the actual amount so paid was $173,532,49.

(Here follows copy of statement of account and release of March 9, 1888, printed in full on pages 3, 4 and 5 of this brief.)

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* This is an error, probably an oversight on the part of the referee. The $40,000 which was deducted from the $213,532.49 was not the $40,000 claimed by the company for overtime penalty, but was the $40,000 which was witheld by the company, by Clark's consent, as an indemnity or security for the payment of claims and liens of sub-contractors and other parties, which it is found the company properly expended, and $521.75, more, in settlement of such claims and liens. (*See 14th finding of fact, Rec., p. 116, 11th finding of fact, Rec., p. 136, and 25th finding of fact, Rec., p. 206.*

14.

That said receipt and paper contained an accurate, truthful and undisputed account of all dealings between said parties, except in the matter of the $40,000 deducted for time forfeiture, the $9,558.63 for nut-locks embraced in the $3,626,865.20 and the lumber hereinafter referred to, and herein valued at $2,425. Besides the above, the defendant has paid the $40,000 reserved as indemnity or security for the payment of claims against Clark, and in addition thereto upon like accounts, the sum of $521.75.

15.

That at the time of the signing and delivery of said last-mentioned paper, the final certificate or estimate of the chief engineer under the contract had not been delivered to the plaintiff, or any of his agents, by the defendant or the said engineer, and the contents thereof were not known to the plaintiff, other than by the reference thereto contained in said receipt of March 9, 1888.

16.

That no other final settlement of the accounts under said contract had been had between the plaintiff and the defendant at the time that the said last-mentioned paper was signed and delivered.

17.

That at the time of the signing and delivery of said last-mentioned paper, the question of the liability of the plaintiff for nut-locks, which had been left by the parties to this action, open for settlement and adjustment until after the completion of the work under said contract, and had been referred to by the defendant to the chief engineer under said contract, had not been passed upon by him; that the said chief engineer had referred the question for opinion to the defendant's counsel, who had not at said time given his opinion in relation thereto.

18.

That no account was ever, otherwise than by said paper and the receipt of said money, stated of the transactions under and connected with said contract between the plaintiff and the defendant.

19.

That in, or about, the months of March and April, 1888, the plaintiff was the owner of 97,000 feet B. M. bridge timber then in the yard of the defendant at Chillicothe, and along the line of the railroad.

20.

That the said lumber did not conform to the standard of the defendant, and was not purchased by the defendant from the plaintiff, or allowed in the final certificate of the chief engineer, under the contract in this section to the plaintiff.

21.

That in and about the month of June, 1888, the defendant took possession of the said lumber and converted the same to their own use without assent or knowledge of the plaintiff

22.

That the value of the said lumber at the time of the taking, in June, 1888, was $2.425.

GEO. HOADLY,
Referee.

CONCLUSIONS OF LAW.

1.

That the defendant is not entitled to charge the plaintiff, or to retain and deduct from the amount earned and payable to the plaintiff under the said contract, the sum of $40,000 as a forfeiture or liquidated damages for not completing the contract upon June 1, 1887.

2.

That under the facts proved in this case, the plaintiff is not legally liable to the defendant for any damages for failure to complete the contract within the contract time or the time agreed upon, for the reason that the plaintiff was prevented, by the negligence of the defendant, and its omission to procure the necessary right-of-way, from completing the said work in such time.

3.

That the plaintiff is not liable to the defendant for the sum of $9,558.63, the cost of patent nut-locks furnished by the defendant to the plaintiff, and used by him in the performance of the said contract.

4.

That there was no obligation imposed by the contract upon the plaintiff to furnish and pay for patent nut-locks to be used in the construction of the said road.

5.

That the plaintiff is not legally indebted to the defendant in any sum whatever for patent nut-looks furnished by the defendant and used in the construction of the railroad under said contract.

6.

That the plaintiff is entitled to recover from the defendant the sum of $2,425, with interest, from June 1, 1888, for the conversion by the defendant of lumber belonging to the plaintiff.

7.

That the signing and delivery, by the plaintiff, of the receipt, on or about the 9th day of March, 1888, and the acceptance of the check of $173,532.49, under the facts and circumstances proved in this case were, as to the two sums of $9,558.63, charged for nut-locks, and $40,000 charged by way of forfeiture for non-performance in time wholly without consideration, and in violation of the contract between the parties, and do not constitute any bar to the recovery of the plaintiff for the sums of $9,558.63 and $40,000, otherwise as due other the contract.

8.

That the signing and delivery of said receipt, and the acceptance of the check thereunder, do not constitute a legal payment or accord and satisfaction of the said sums of $9,558.63 and $40,000, or either of them, or any part or either of them.

9.

That no account of the transactions, under this contract, and of the claims sued on in this action, was ever had, or

stated between the parties to this action otherwise than by said receipt, or paper, of March 9, 1888.

10.

That the plaintiff is entitled to recover the amount certified by the chief engineer, of $3,895,793.79, without the deduction claimed by the defendants for nut-locks of $9,558.63, and without allowance to the defendant by way of forfeiture for non-completion of the railway on the 1st day of June, 1887, said sums together amounting to $49,558.63, with interest, from March 9, 1888; and is also entitled to recover for timber used by the defendant on the 30th day of June, 1888, to the amount of $2,425, with interest, from June 30, 1888, the whole amounting, at the date of this report, viz.: the 4th day of December, 1897, to the sum of $81,305.88, for which, with interest from this date and disbursements, the plaintiff is entitled to judgment, less amount paid by the defendant in excess of the reserved $40,000, $521.75, with interest, from and to the same date, being in all this day, $826.53.

There will be judgment, therefore, for the plaintiff for $80,479.35, with interest and costs, interest to be computed from December 4, 1897.

GEO. HOADLY,
Referee.

In addition to the foregoing findings of fact, twenty-seven additional findings of fact were made at the request of defendant. It is not necessary to state them in full at this time, but they may be found in the record pages 120 to 137, 146, 188, 189, 190, 191, 193, 195, 196, 203, 206 and 210, and will be subsequently referred to in our argument. They relate to the execution of the contract for the construction of the road, the supplemental agreement by which the sum of $40,000 should be deducted from the contract price, if the road was not completed by June 1, 1887, the failure of Clark to complete the road within that time, the final estimate and certificate of the chief engineer of the company, the sending of the statement of account

and form of release to Clark with the information that upon the same being signed and returned by him a check for the balance due him, $173,532.49 would be sent to him, the return of said statement of account and release signed by Clark and witnessed, the sending to him of a check of the company for such balance, the deposit and collection of said check by Clark, and his retention of the amount paid him thereon, the expenditure of the $40,000 and $521.75 besides, reserved by the company with Clark's consent at the time of the settlement, to meet unpaid claims against Clark incurred in the construction of the road, the furnishing of the nut-locks to Clark by the company for use in the construction of the road.

And by the twelfth finding (Rec., p. 136) it is found that the company did not require Clark to furnish any material or perform any work, or to furnish or erect any structures of a more expensive design than required of him by the contract for the construction of the road, otherwise than allowed for in the final estimate and certificate of the chief engineer.

Aside from these formal findings, the referee made quite a full report of the case which will be found at pages 49–98 of the record.

ERRORS RELIED UPON.

1. *The court below erred in holding that the findings of fact support the judgment as to the item of $9,558.63 for nut-locks, and the item of $40,000 for time forfeiture.*

2. *The court below erred in holding that there was no consideration for the settlement made by the parties as to the items of $9,558.63 for nut-locks, and $40,000 for time forfeiture.*

3. *The court below erred in holding that the question, whether there was* ANY *evidence in the record to sustain the finding that the defendant in June, 1888, wrongfully took possession of certain lumber and converted it to its own use, was not reviewable.*

4. *The court below erred in holding that it was proper to allow the plaintiff to amend his complaint on the trial, against defendant's objection, by adding thereto a cause of action sounding in tort, and recover thereon.*

ARGUMENT.

I.

The court below erred in holding that the findings of fact support the judgment as to the item of $9,558.63 for nut-locks and the item of $40,000 for time forfeiture. Under the findings the judgment as to these items should have been in favor of the company.

By the thirteenth finding of fact it is found that on the 9th day of March, 1888, Clark signed and caused to be delivered to the company the statement of account, receipt and acknowledgment, which are made a part of such finding, and that thereupon the company paid to Clark the sum of $173,532.49, which amount he received in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of the contract for the construction of the railroad, excepting the obligation of the company to account for the $40,000 reserved to meet certain claims against Clark as stated in the account or instru-

ment of settlement. By the twenty-second and twenty-fourth findings of fact (Rec., pp. 203, 206), it is found that this account or instrument of settlement was sent to Clark by the vice-president of the company with notice that when he signed and returned it, a check for $173,532.49 would be delivered to him, that Clark signed and returned said instrument of settlement and received a check for the amount stated, which check was paid and the amount thereof received by Clark, which he has ever since retained. *It is also found as a fact by the thirteenth and fourteenth findings that the sum of $9,558.63 claimed by the company to be due it for nut-locks furnished to Clark, was embraced within the settlement. It likewise appears by the instrument of settlement itself, that the $40,000, claimed by the company on the ground that the road was not completed within the time specified in the supplemental agreement, was also embraced within the settlement.*

The legal effect of these findings of fact is that the settlement evidenced by said statement of account, receipt and acknowledgment, is a complete and absolute bar to a recovery in this action for any of the items embraced therein, *unless there are other facts found which avoid or set aside the settlement in whole or in part.* The "*other facts*" necessary to be found in order to defeat the settlement are:

1. *That the settlement was procured by fraud.*
2. *That it was the result of mutual mistake or*
3. *That it was without consideration.*

Before considering the findings of fact on which the Circuit Court entered judgment against the company, let us recur to the rules of law that govern settlements of this character. They are:

"1. *The law favors settlements by parties without judi-*
"*cial intervention, and therefore lends every presumption to*
"*support them; it presumes that they were made in good*
"*faith, without fraud or mistake, and that a consideration*
"*sufficient to support them moved from one party to the*
"*other.*

"2. *That settlements once made will be allowed to stand*
"*and will be held to be binding upon the parties to the full*
"*extent they purport on their face to bind them, until they*
"*are set aside or avoided for either fraud, mistake or want*
"*of consideration.*

"3. *The burden is upon the party seeking to avoid a*
"*settlement to show that it was procured by fraud, or was the*
"*result of mutual mistake, or was without consideration.*

"4. *This burden is not met by offering proof that is con-*
"*flicting or uncertain in its character or meaning, or proof*
"*that is susceptible of different constructions, theories, or in-*
"*ferences. The proof must be certain and convincing and,*
"*taken as a whole, consistent with no other theory than that*
"*the settlement was procured by fraud or was the result of*
"*mutual mistake, or was without consideration.*"

This is the rule; otherwise courts might commit a greater wrong in setting aside a settlement once made. than the party seeking to get rid of it claimed was committed against him in making it.

"No practice could be more dangerous than that of "opening accounts which the parties themselves have ad-"justed on suggestion supported by doubtful or by only prob-"able testimony. * * * The whole labor of proof lies "upon the party objecting to the account, and errors which "he does not plainly establish cannot be supposed to exist." Chief Justice MARSHALL in *Chappelaine vs. Dechenaux*, 4 Cranch., 309.

"Much the largest number of controversies between busi-
"ness men are ultimately settled by the parties themselves;
"and when there is no unfairness, and all the facts are
"equally known to both sides, an adjustment by them is final
"and conclusive. Oftentimes a party may be willing to yield
"something for the sake of a settlement; and if he does so
"with a full knowledge of the circumstances, he cannot affirm
"the settlement, and afterwards maintain a suit for that which
"he voluntarily surrendered." Justice CLIFFORD in *Hager vs. Thompson*, 1 Black., 80-94.

"The law favors settlements, and courts will not open or
"disturb them but for very cogent reasons." LYON, J., in *Hoyt vs. McLaughlin*, 52 Wis., 283.

"The transaction then being an account stated is con-
"clusive upon the parties, unless the plaintiff affirmatively
"shows fraud or mistake. The law is stated in *Phillips vs.*
"*Belden*, 2 Edw. Ch., 1, that if either party attempts to im-
"peach the settlement and to open the accounts for re-exami-
"nation, either wholly or in part, and which can only be
"done upon the ground of fraud, mistake or error, the
"burden of proof rests upon the party impeaching, and he
"must prove the fraud or point out the error or mistake on
"which he relies." PARKER, J., in *Lockwood vs. Thorne*, 11 N. Y., 175.

The foregoing propositions of law are applicable to and control this case; and when as here the court will review the findings of fact only (not the evidence), for the purpose of determining whether the judgment as to the items of $9,558.63, allowed for nut-locks, and $40,000 allowed for forfeiture, is supported by them, such findings must be certain and in their terms find either fraud, mutual mistake or want of consideration, or taken as a whole, inconsistent with any other theory than that the settlement was procured by fraud or was the result of mutual mistake, or was without consideration, before the court will be warranted in ignoring it, as to either or both of the foregoing items and allowing a recovery therefor.

If the findings are doubtful or uncertain in meaning, or

if they are as consistent with the contention of the company as they are with the contention of Clark, then the settlement must stand, and the judgment herein should have been for the company and not for Clark.

Keeping the above rules in mind, a review of the findings of fact will show that the judgment herein is wholly without support as to either of the items of $9,558.63 for nut-locks, or $40,000 for forfeiture. Aside from the *thirteenth* finding of fact, which finds that a settlement was made between Clark and the company of all matters arising out of the construction of the railroad, the findings which relates to these two items are the *seventh*, *eighth*, *ninth*, *tenth*, *eleventh*, *twelfth*, *fourteenth*, *fifteenth*, and *seventeenth* findings of fact.

It is found by the *seventh* and *eighth* findings of fact that the company failed to furnish Clark with rights-of-way, as it had agreed to do, in time to enable him to complete his contract within the time specified, and delayed him in the performance thereof at a point upon the railroad known as Minneville until October 27, 1887, and that, by the fault and negligence of the company in this respect, Clark was prevented from completing his contract within the required time. It may be conceded, if there had not been a settlement made which embraced the item of forfeiture, and the amount thereof had been withheld by the company, that the facts found by these findings would authorize a recovery thereof, in an action brought against the company for that purpose. But this is not now material. The question here presented is: Was there a sufficient consideration for the settlement as a whole? *If a dispute existed between the parties with respect to any matter embraced within the settlement, that dispute furnished a sufficient consideration for the settlement.* Was there such a dispute? Aside

from the *fourteenth* finding, which finds that these items of nut-locks and forfeiture were in dispute, the findings do not, in terms, show that there was, nor that there was not, a dispute as to the item of $40,000 charged for forfeiture; but from the *seventh* and *eighth* findings themselves, it may properly be inferred that the *facts* upon which these findings are based, were in dispute. Opposing counsel conceded in their brief and argument in the court below that the *right* to deduct the amount of the forfeiture from the amount earned by Clark was in dispute.

However this may be, this court is, by the law, compelled to assume that there was a dispute. Presumptions arise upon facts. The material fact in this case is this: A contract evidencing a settlement was made. Upon that fact a presumption arises that it was made upon sufficient consideration; and it necessarily follows that it was incumbent upon Clark to prove want of consideration. The burden of proof rested upon him, and in order to prove want of consideration he was bound to negative every element which, under the law of contracts, may properly constitute a consideration for a contract of settlement. It was, therefore, incumbent upon him to prove that there was no dispute, and the court is now conclusively bound to assume that he failed to make such proof, for there is no finding of a want of consideration, nor is there any finding that no dispute existed between the parties at the time of the settlement. As before stated, the *seventh* and *eighth* findings presuppose that the facts upon which they are based were in dispute; otherwise there would have been no necessity or occasion for the court to have made the findings; and counsel for respondent concede that they were in dispute, for they say the *right to make the deduction was questioned.*

And Judge LaCombe says, in speaking of the claims for nut-locks and over-time penalty: **"Both items were "legitimate matters of dispute, and unless settled by "agreement of parties, might fairly be brought by "either party into court."**

We therefore contend that there is nothing in either the *seventh* or *eighth* findings of fact which in any manner affect the validity of the settlement made by the parties as found by the *thirteenth* finding of fact; but on the contrary they support the settlement.

It is found by the *ninth*, *tenth* and *twelfth* findings of fact that during the progress of the work the company purchased and furnished to Clark, and charged him for, nut-locks for which the company paid $9,558.63; that Clark was ordered by the company to put such nut-locks on the road at the beginning of the work; that he protested against their use, and finally yielded, and used them upon the promise that the charge which the company had made for them *would be adjusted after the completion of the work*. From these findings it clearly appears that the charge for nut-locks was unadjusted, and therefore in dispute at the time of the settlement, and that the right of the company to require Clark to use nut-locks in the construction of the road, and charge him therefor, came into dispute at the very beginning of the work under the contract. Such dispute was a sufficient consideration for the adjustment of the charge for nut-locks, which was made "*after the completion of the contract*," by the settlement of March 9, 1888. In view of the arrangement that the question of the liability for this charge should be adjusted "*after the completion of the contract*," it is fair to presume that both parties intended thereby to settle that question at the time when a final settlement of all matters arising out of the construction of the railroad should be made. Clark must therefore have known that the settlement which the company offered him,

and which he accepted, *after the completion of the contract*, settled the dispute concerning the liability for the charge for nut-locks, the same as it settled all other matters between him and the company arising out of the construction of the road. There is certainly nothing in any of these findings which can be construed as a finding of fraud, mutual mistake or want of consideration.

The *eleventh* finding of fact that there are no provisions in the contract which required Clark to use, and that he never agreed to use, nut-locks in the construction of the road, is neither a finding of a want of consideration, or of a mutual mistake of fact. So far as this finding relates to the written contract under which the road was constructed, it is a conclusion of law and not a finding of fact. It is fair to presume, in view of the *twelfth* finding of fact, that there was a dispute between Clark and the company from the beginning of the work under the contract, with respect to the use of nut-locks, in the construction of the road—Clark contending that the contract did not require him to use nut-locks, while the company claimed that it did. This being true, the allowance by Clark in the settlement of March 9, 1888, of the amount charged by the company for nut-locks, was not even made under a mutual mistake of law; and, if it was, that furnishes no ground for setting aside the settlement; for money paid under a mistake of law, with full knowledge of the facts, is not recoverable. *There is no finding that Clark did not have a full knowledge of all the facts at the time he made the settlement*, and without such finding, the presumption is that he had such knowledge. So far as this finding relates to any supposed or claimed agreement outside of the written contract under which the road was constructed, it does not find that the *facts* upon which this finding is based were not in dispute; and, if it is necessary, in order to support the settlement, that such facts should

have been in dispute, the law will presume that they were in dispute, and that such dispute was in good faith, for the law will presume in favor of the settlement.

It is found by the *fourteenth* finding of fact, that the statement of account, receipt and acknowledgment, contained an accurate, truthful and undisputed account of all dealings between the parties, *except in the matter of the $40,000 deducted for time forfeiture, and the $9,558.63 for nut-locks*, embraced in the credit of $3,626,865.20, claimed by the company in said statement of account, as a credit to be applied in payment of the amount earned by Clark under the contract for the construction of the road. Unless this finding means that the statement of account was inaccurate, untruthful and *disputed as to these two items*, then it does not amount to a finding one way or the other as to these items; that is, it does not find that these items were accurate or inaccurate, truthful or untruthful, disputed or undisputed. If it means that the statement of account was inaccurate and untruthful as to these items, that furnishes no ground for setting aside the settlement, for it is not found that Clark did not have full knowledge thereof at the time he received the money and made the settlement. If it means that the statement of account as to these items was disputed, then such dispute was a sufficient consideration to support the settlement in its entirety. If, however, it does not amount to a finding one way or the other, as to these items, then it is wholly immaterial. And if the foregoing is not a correct interpretation of the finding, then the most which can be said of it is, that it is doubtful and uncertain in its meaning, and is as consistent with the contention that these items were in dispute between the parties as that they were not in dispute. Whichever of these views may be taken of this finding, the result is that it in no way disturbs

or invalidates the settlement, which is found by the thirteenth finding of fact was made by the parties.

It is found by the *fifteenth* finding of fact, that at the time Clark signed and delivered the statement of account, receipt and acknowledgment to the company the final certificate or estimate of the chief engineer had not been delivered to Clark or to any of his agents, by either the company or the chief engineer, and that the contents thereof were not known to Clark other than by reference thereto contained in said statement of account, receipt and acknowledgment. This finding amounts to nothing in any aspect of the case, unless there was an obligation on the part of the company requiring it to deliver the final certificate and estimate of the chief engineer to Clark, and even then it is wholly immaterial as affecting the settlement. The contract under which the final certificate and estimate were made, did not require that they shou'd have been delivered to Clark or to any of his agents; on the contrary, it provides, Section 2, Article 15, that the chief engineer should furnish said certificate and estimate to the railway company only, which he did. The referee so held in his first report. (Rec., p. 77; fol. 231.) And further, if there had been an obligation on the part of the company to deliver the final certificate and estimate to Clark, compliance therewith could have been waived by him. He was advised by the very first line and paragraph of the statement of account, that the chief engineer had made a final estimate of all work done and material furnished by him under the contract. Had he desired to examine the same before making a final settlement, it is fair to presume that this privilege would have been accorded him; it is likewise fair to presume that at the time the settlement was made, he was satisfied with the statement of account and the settlement proposed thereby,

and therefore did not desire an examination of the final certificate and estimate of the chief engineer.

The *seventeenth* finding of fact is as follows:

"That at the time of the signing and delivery of said last-mentioned paper, the question of the liability of the plaintiff for nut-locks, which had been left by the parties to this action open for settlement and adjustment until after the completion of the work under said contract; and had been referred to by the defendant to the chief engineer under said contract, had not been passed upon by him; that the chief engineer had referred the question for opinion to the defendant's counsel, who had not at said time given his opinion in relation thereto." (Rec., p. 116; fol. 348.)

Concerning this finding it may first be observed that it but supports and emphasizes the contention of the company that the charge for nut-locks was in dispute at and prior to the time of the settlement, for it is found by this finding that the question of Clark's liability to pay for the nut-locks had been left by the parties open for *settlement and adjustment* until after the completion of the work under the contract. The gist, however, of the finding is that the question of liability for the nut-locks had been referred *by the company* to its chief engineer, and by that officer to the counsel of the company for an opinion, and that neither had passed upon it at the time Clark signed and delivered the statement of account, receipt and acknowledgement of March 9, 1888, to the company. Does this finding in any way or to any extent invalidate or avoid the settlement? It does not, unless it amounts to a finding of fraud on the part of the company, or that the settlement, so far as it embraced the nut-locks, was the result of a mutual mistake between Clark and the company. It does not amount to a finding of fraud, for it is not found that Clark or his agents consented to any such reference or agreed to be bound by either the opinion of the chief engineer or the counsel of the company. Neither is it found that either Clark or his

agents at any time knew that the company had referred the question of Clark's liability for the nut-locks to its chief engineer, or that the chief engineer had referred the question to the counsel of the company for an opinion. *Neither is it found that the company, in any manner, concealed from Clark, or his agents, anything which was essential for him to know concerning its action regarding the nut-locks, or the reference to either its chief engineer or counsel of the question of Clark's liability therefor.* And further, if it be conceded that Clark knew that this question had been referred to the chief engineer for an opinion, either with or without his consent, *there is no finding that Clark did not know at the time he signed and delivered the statement of account, receipt and acknowledgement to the company, and received the balance shown to be due him thereby in full settlement of all matters between him and the company, that the chief engineer or the counsel of the company had not passed upon the question of his liability for the charge which the company had made against him for these nut-locks; or that he did not have full knowledge of all the facts in reference thereto.* In the absence of such a finding it must be presumed that Clark, at the time he made the settlement, had full knowledge of all the facts, and knew that the chief engineer and the counsel of the company had not passed upon the charge for nut-locks, and that he was satisfied with the settlement proposed by the company, regardless of whether the chief engineer and counsel had or had not passed upon the question of his liability for the nut-locks, or how they had decided it. It does not amount to a finding of mutual mistake, for it is not found that Clark and the company both supposed, when the settlement was made, that the chief engineer and counsel of the company had passed upon the question which had been referred to them concerning the

liability for the nut-locks, or that the settlement was made upon any such supposition, or upon the supposition that the item of nut-locks was not included in the settlement. The company certainly did not act upon any such assumption, for it then claimed the amount charged for the nut-locks, and included it in the statement of account. *When as here, the parties stand on an equal footing, and there is an absence of fraud or misrepresentation, a mistake of fact of one of the parties to the settlement, furnishes no ground for setting aside the settlement.* **The mistake to be availing must be a mutual mistake.** That the settlement was made in the utmost good faith and fairness, there is not the least doubt. To repeat again what Judge LACOMBE said in speaking of it:

"*There is nothing in the findings to show that plaintiff "signed the receipt improvidently or without due considera- "tion, nor that it fails in any way to set forth accurately the "agreement entered into between the parties on that day, nor "that the plaintiff was under any pecuniary stress pressing "him to accept a smaller sum than was due.*" (Rec., p. 518.)

This statement is fully sustained by the testimony of Clark:

"I supposed at the time this receipt was signed and I got this check, that all the work was done, and I was expecting a *final payment* on account of the contract. *It was time for it and I naturally expected it.*" (Rec., p. 406.)

Recurring to the findings of fact, they show that neither fraud nor mistake intervened in the settlement—neither is claimed. They also show that the items of $40,000 for overtime forfeiture and $9,558.63 for nut-locks were embraced and included in the settlement, and that Clark knew that and intended to make a settlement of all matters, disputed and undisputed, between him and the company,

when he signed the release and accepted the $173,532.49, as the whole amount due him under his contract. They also show that these items were in dispute, and as Judge LACOMBE states in his opinion, "*Were legitimate matters of dispute.*" So that we come back to the single question in the case, Was the dispute over these two items a sufficient consideration to support the settlement as a whole? Counsel for respondent contends that it is not; and this, for the reason that as to all the items embraced in the settlement, with the exception of the two items which were in dispute, there was no dispute between the parties, and by the payment of $173,532.49 the company paid Clark no more than he was legally entitled to, exclusive of the two disputed items, and therefore, as to them, the settlement was without consideration. Conceding that the only items of the account between the parties that were in dispute, were the items of $40,000 for overtime forfeiture, and $9,558.63 for nut-locks, the question arises, What was the legal effect of this dispute? We submit that it was to make the account an unliquidated and disputed account, for these items were part of the account, and being in dispute, the balance due on the account was necessarily in dispute. An account cannot be said to be liquidated when the amount of the balance due is in dispute. This was the condition in which the account between the parties was prior to the settlement, Clark claiming that a balance of $223,091.12 was legally due him, while the company insisted that but $173,532.49 was legally due him. This dispute could be adjusted only by agreement of the parties or by litigation. Clark knew this. Knowing this, he concluded that it would be to his advantage to accept the balance tendered him by the company as the balance due him, rather than incur the expense, delay and chances of

litigation. The consideration, therefore, which moved Clark to make this settlement is the consideration which inheres in and supports every settlement between parties when a dispute exists over the balance due, namely: the avoidance of litigation. A compromise, says Mr. Justice BOUVIER in his valuable Law Dictionary, is:

"An agreement between two or more persons, who, to "avoid a lawsuit, settle their differences on such terms as "they can agree upon."

Here Clark and the company agreed upon a settlement, and having accepted the amount agreed upon as the balance due on the account, and in full settlement of all claims and demands embraced therein, such acceptance is as binding upon Clark, neither fraud nor mistake having intervened, as if such balance had been determined by judicial proceedings to which he was a party.

Kingsley vs. Melcher, 56 Hun, 547, 551.

In other words, Clark stood after that settlement in precisely the same position that he would have stood had he brought suit to recover the full amount claimed by him, to-wit: $223,091.12, and had recovered but $173,532.49, and the company had paid that amount into court, and he had received the same and satisfied the judgment.

The contention of opposing counsel that a settlement, once made, may afterwards be considered by the courts by piecemeal, and if it is ascertained that one or more of the items embraced within it, about which there was a dispute, were surrendered without the payment of anything thereon, the settlement as to such items will be disregarded and held not to be binding upon the party releasing, is supported by neither reason nor authority. The cases relied upon to support the contention of respondent are to the effect that when the *amount due* is a liquidated sum, the payment of a

part thereof, even though received in full satisfaction, is not a bar to the recovery of the balance. We have no fault to find with the rule announced in these cases. But they do not apply to or control this case. Here the amount due was not liquidated, but was in dispute; Clark contending that $223,091.12 was the balance due him, while the company insisted that $173,532.49 was all that was due him. The courts are uniform in holding that when the amount due is in dispute, or the liability of the debtor as to certain items of the account is in dispute, the payment of the amount conceded to be due, exclusive of the items in dispute, upon condition that the amount so paid shall be received in full satisfaction, is a sufficient consideration to support the settlement as a whole.

In *Fuller vs. Kemp*, 138 N. Y., 231, the plaintiff, a physician, sent the defendant an itemized bill showing 126 visits, for each of which a charge of $5 was made, and four consultations, at the rate of $10 each, making a total of $670. The defendant claiming that certain of the items were overcharges, made deductions from the bill to the amount of $270, and thereupon sent the plaintiff his check for $400 the amount which defendant conceded to be due. The plaintiff received the check and then sent his bill to the defendant charging $670 for services and crediting upon it $400, the amount received by the check. The defendant thereupon wrote the plaintiff to the effect that the check was sent him upon the express condition that it was a payment in full satisfaction of his bill, and notifying him either to keep the money upon the condition named or to return it by first mail. The plaintiff did not reply to this letter and after the expiration of nearly a year, brought suit to recover $270, the balance of his account, after applying the $400 received. The court held that there had

been, in law, an accord and satisfaction of the plaintiff's claim, and that no recovery could be lawfully predicated upon it. In this case, as in the case at bar, certain items of the account were disputed, and certain items were undisputed. The defendant conceded that $400 was due the plaintiff, and therefore paid him only the amount of the undisputed items, the same as was done in the case at bar, yet the court held that the dispute over certain of the items made the account an unliquidated one, and by receiving the amount of the undisputed items with notice that it was sent as a payment in full, the plaintiff could not recover the balance of his demand. In principle, this case is precisely like the case at bar.

In *Nassoiy vs Tomlinson*, 148 N. Y., 326, the plaintiff sold the property of the defendants for the sum of $30,000, upon which he claimed a commission of five per cent., amounting to $1,500. The defendants disputed the amount of plaintiff's commissions and sent him a check for $300, together with a receipt stating that the same was in full for commissions. The plaintiff received the check and receipt, but immediately wrote to defendants saying, "I don't know what you mean by sending me a check for $300. I want my five per cent. commission on the $30,000." No reply was made to this letter by the defendants and the plaintiff retained both the check and the receipt and some months afterwards called upon the defendants for the balance of his commissions, but they declined to pay anything further. Plaintiff never returned the check or the receipt but endorsed the check and drew the money on it and later on sent the defendants a receipt for $300, as part payment for his commissions, and notified them that he still claimed he was entitled to the balance $1,200. He

never returned or offered to return the amount of the check. The court held that there having been a dispute between the parties over the amount due, and the defendants having sent the plaintiff the amount which they conceded to be due and the plaintiff having received such amount with notice that it was sent to him in full payment of his commissions, there had been an accord and satisfaction, and that the plaintiff could not recover the balance of the commissions which he claimed he was entitled to. In this case the court lay down this rule which we contend is decisive of the case at bar.

A demand is not liquidated, even if it appears that something is due, unless it appears how much is due, and when it is admitted that *one* of *two* specific sums is due, *but there is a genuine dispute as to which is the proper amount*, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction.

In the *Nassoiy* case the plaintiff claimed that the defendants owed him the sum of $1,500 while the defendants claimed that they owed him but $300. (Opin., p. 330.) In the case at bar Clark claimed that the company owed him a balance of $223,091.12, while the company insisted that it owed him but $173,532.49. In the *Nassoiy* case plaintiff received a check for $300, with notice that it was sent to him in full payment of his commissions. He retained the check and used the money, *but did not sign the receipt which accompanied it.* In the case at bar the company sent Clark a statement of the account, showing how the balance of $173,532.49 was arrived at, together with a release in full for him to sign, stating that when it was signed and returned, a check for such balance would be sent to him. *Clark signed the release, returned it to the company*, received his check, endorsed it and got the money, and nearly six years afterwards brought this suit to

recover the difference between the balance claimed by him and the amount which he received in full settlement, being the balance conceded by the company to be due him. In the *Nassoiy* case the court held that the plaintiff, having accepted the amount which the defendants conceded to be his due in full satisfaction of his claim, notwithstanding he did not sign the release which was sent him, was bound by such acceptance and could not have further recovery. Here the defendant paid only the amount which he admitted to be due in any event. Nothing more was paid in compromise of the dispute between the parties, namely, whether the plaintiff should be paid 1 per cent. or 5 per cent. of the amount for which he sold the property. The plaintiff in any event was entitled to 1 per cent. commission. This was conceded by the defendant. In principle, therefore, this case is precisely like the case at bar, and we submit that the acceptance by Clark of the amount paid him in full satisfaction, and the execution and delivery of the release, bound him as effectually as the plaintiff was bound by the acceptance in the *Nassoiy* case.

In *Komp vs. Raymond*, 58 New York Supplement, 909, the parties entered into a contract by which the plaintiff agreed to render services in the Empire of Japan for the defendant for five years, at a specified yearly salary, a portion of which was to be paid monthly to him in Japan and the balance when contract was completed. The services were performed as agreed, and upon the final settlement a dispute arose between the parties as to the balance due, which depended upon the construction to be given to the contract, namely, whether the plaintiff was to be paid in Japanese money, called "yens," or the money of the United States. If the former, then the defendant was correct in its claim that only $1,250 was due; and if the latter, the

plaintiff was correct that there was over $6,000 due. The court held that there was an honest dispute between the parties as to the amount actually due the plaintiff. It appears, however, that the defendant declined to pay more than $1,250 in settlement, and gave the plaintiff a check for that amount, which he received, and thereupon he endorsed upon the back of the contract referred to the following:

"Received payment March 3d, 1896, $1,250; being in full payment of this contract, expiring January 1st, 1896, with salary, interest and allowances, besides closing his account to March 1st, 1896.

FREDERICK KOMP."

At the time plaintiff received the check and endorsed said receipt on the contract, he notified the defendant that if he did not pay him the balance, he would take the matter into court for settlement. Plaintiff used the check and applied the proceeds toward the reduction of the amount claimed by him under the contract, and then brought action to recover the balance. He had a verdict for the full amount claimed and from the judgment entered thereon the defendant appealed. The judgment was reversed, the court holding, following the rule laid down in *Nassoiy vs. Tomlinson, supra*, that there had been an accord and satisfaction and that the plaintiff could not recover, saying:

"We are of the opinion that, according to the plaintiff's own "testimony, an accord and satisfaction was so conclusively "established as to leave no question of fact for the jury. "The plaintiff's claim was unliquidated. A demand is not "liquidated, even if it appears that something is due, unless "it appears how much is due, and when it is admitted that "one of two specified sums is due, but there is a genuine "dispute as to which is the proper amount, the demand is "regarded as unliquidated, as applied to the subject of "accord and satisfaction. *Nassoiy vs. Tomlinson*, 148 N.

"Y., 326, 42 N. E., 715. Here the plaintiff claimed, as we "have already seen, that the defendant owed him something "over $6,000, while the defendant claimed that it owed "him but $1,250; and which one was correct depended "upon the kind of money that the plaintiff was entitled to re- "ceive under the contract. *Did, then, the acceptance by the "plaintiff of the offer to pay a sum conceded to be due satisfy "and discharge that claim?* We think it did, and that an "accord and satisfaction are evidenced by the statement "signed by the plaintiff, which statement cannot be contra- "dicted by parol evidence."

To the same effect is *Goodrich vs. Sanderson*, 55 N. Y. Supplement, 881. There the debit side of the account was conceded, the same as was conceded in the case at bar that Clark had earned a certain amount under his contract with the company. The dispute arose over the amount of the credits which should be applied toward the discharge of the debit side of the account, but in the settlement the whole amount of the credits claimed was allowed and the balance received in full settlement. Afterwards suit was brought to recover the amount of the credits which were in dispute, on the ground that the entire amount of the credits which were in dispute having been allowed, there was no compromise and therefore no accord and satisfaction. The court held that there could be no recovery; that the account was an unliquidated one and the fact that the plaintiff in settlement allowed the disputed items of the account in full, did not preclude an accord and satisfaction. The case of *Nassoiy vs. Tomlinson, supra*, is cited as authority.

In *Ostrander vs. Scott*, 161 Ill., 339, the plaintiff had an account against the defendant amounting to $5,282.58, the items of which were not disputed; but defendant claimed that he was entitled to be allowed the sum of $1,210 for

commissions on goods sold. Accordingly he sent his check for the balance, $4,072.58, to the plaintiff, at the same time notifying him that it was sent in settlement of his account in full, and if not accepted as such to return it. The check was retained by the plaintiff, and in due time he brought suit against the defendant to recover the amount withheld. *Here it will be seen that the whole amount in dispute was withheld and only the amount conceded to be due was paid.*

The court held that there could be no recovery and that an account cannot be considered as liquidated so as to prevent the payment of a less amount from operating as a satisfaction of the whole, where there is a controversy over the set-off and the amount of the balance is in dispute.

In *Tanner vs. Merrill*, 108 Mich., 58, the plaintiff sought to recover a certain amount which had been deducted from his wages by the defendants, his employers. The *amount* of his wages was not in dispute, but the *right* to make any deduction was questioned. The plaintiff received the amount of his wages, less the deduction, and gave a receipt in full, and afterwards brought suit, as Clark has done, to recover the balance on the ground that having received only the amount admitted to be his due, there was no consideration for the release as to the item that was disputed. The court decided that the plaintiff could not recover, holding:

"1. That the rule that a receipt of part payment, to be "effective in discharge of the entire debt, must rest upon a "valid consideration, is limited to cases where the debt is "liquidated by agreement or otherwise; and a claim, *any "portion of which is in dispute*, cannot be considered to be "liquidated within the meaning of the rule.

"2. That a receipt in full, given *upon payment of the "undisputed part of a claim*, after a refusal to pay another "part which is disputed, is conclusive as against the right of

"the creditor to recover a further sum, in the absence of "mistake, fraud, duress or undue influence."

Precisely the same question was involved in these cases that is involved in the case at bar.

The case of *United States vs. Child*, 12 Wallace, 232, was an appeal from the Court of Claims (*Child vs. United States*, 4 Court Claims, R. 185). In that case, in the Court of Claims, Child & Company were plaintiffs, claimants against the United States for the sum of $163,000, claimed as a balance due them on a sale of military stores to the government. It appeared that the chief quartermaster of the department of the West had purchased from the claimants military stores for the United States, the fair value of which was, *as the Court of Claims found*, $478,119.62, the price charged by the claimants, for which vouchers were given by the quartermaster. Payment of the vouchers was suspended by the War Department pending an investigation, and a military commission was appointed to investigate the claim, with others. The claimants' books and papers, vouchers, etc., were seized and produced before the commission. As the Court of Claims said:

"The commission examined them all; and at the conclu- "sion of its investigations endorsed upon the vouchers the "amount allowed by it, and ordered that the sum of $163,- "111 be deducted from the vouchers. The commission "also withheld all of the vouchers until the claimants signed a "receipt or agreement, *not under seal and without considera- "tion* (as the Court of Claims held), which provided that, "when the reduced amounts allowed by the commission "should be paid, the payment should be in full of all the "claimants' demands against the United States."

The Court of Claims further found that

"The claimants at the time of receiving payment made "no formal objection or protest, but were required to and "did sign a receipt, *not under seal and without consideration*,

"whereby they acknowledged having received such re-"duced amounts, *in full of the above account.*"

The Court of Claims also held, as matter of law:

"That the agreement or receipt, signed by the claimants "on receiving back their vouchers, was obtained and exacted "by duress of their goods, *and was wholly without considera-"tion and void;*" and further: "That the receipts re-"quired by the quartermaster at the time of payment, ex-"pressing upon their face that a less sum was received "than that due, *and being without consideration*, did not "operate as a release of the balance of the claimants' ac-"counts and where wholly void."

As to the matter of consideration, the United States Supreme Court, upon appeal from this decision (12 Wall., 243, per MILLER, J.), said: "Although it is found by the "court that these receipts were not under seal and were "without consideration, **the latter statement must have "some meaning not apparent to us, in view of the "other fact found also, that over $315,000 was paid to "the claimants on those accounts at the time they "gave the receipts.**"

That is, in effect, saying that the amount paid on signing the receipt, was a sufficient consideration for the release of the rest of their claims.

But, it is submitted that, when the commission appointed by the government had reported as to the amount which should be allowed on the claimant's demand, and the amount to pay it had been appropriated, the demand was liquidated at that amount; the government could not "in good conscience" refuse to pay it; nor could it have any "defense that could be urged in good faith, or with color of right" against its immediate payment, or to any action which might be brought to recover it.

In an earlier case (*United States vs. Adams*, 7 Wallace,

463), a similar ruling was made by the U. S. Supreme Court. The claimant, Adams, presented certain claims against the government; one for $83,500 for a *balance* due, for building certain mortar boats according to a specific contract; and another for $25,400, a balance claimed to be due, for building tugboats for the government under a contract. A commission appointed to investigate the claims, allowed $75,959.24 to be due upon the first claim, and $20,196 on the second; and gave *vouchers* therefor, which the government paid, and for which the claimant gave a receipt in full of all demands, *which he signed under protest.* (7 Wall., 466.)

The Court of Claims held that Adams was entitled to recover the whole of the contract price, for which judgment was given. But the United States Supreme Court held that the claimant could not afterwards recover for the balance of the contract price, (7 Wall., 467); that the acceptance of the payment of the amount of the voucher was a bar to any further demand against the government, (pp., 479-481, etc.); and that this was so, independently of the signing of the receipt in full; that *it was the acceptance of the money payment which constituted the accord and satisfaction.*

The doctrine of this case was affirmed by the Supreme Court in the *Child* case, 12 Wallace, 232, where it was held, that in neither case was the voluntary submission of the claim against the government to the commission appointed to investigate such claims, essential to bar a recovery. "*The bar in both cases rested upon the voluntary "acceptance by the claimants of a smaller sum than their "claim as a full satisfaction of the whole, and acknowledging "this in a receipt for the amount paid.*"

The court said: "We lay out of view in this case, as in "the Adams case, the receipts which they gave under pro- "test, in order to regain possession of their vouchers. But "we cannot disregard the finding of the court, that, after "Congress had appropriated the sums found due by the "commissioners * * * the claimants received the "amount so allowed, and signed upon each voucher a re- "ceipt whereby they acknowledged having received said "reduced amount *'in full of the above account.'*" (12 Wall., 243.)

And the court also said: "It is of no avail to urge that "the Court of Claims has found that the whole claim was "just and ought to be paid. After the compromise that "question was no longer open to inquiry. *It is the very "essence of such adjustments of disputed rights that the con- "test shall be closed.*" (12 Wall., 245.)

Both of these cases were again approved by the Supreme Court, in *United States vs. Justice* 14, Wall., 535, where it was held that "where a contractor with the United "States and the Government disagree as to what is justly "due to the contractor, and the question is referred by the "War Department to a commission to audit such claims, and "the commission finds a certain sum as justly due, and the "contractor receives that sum, he cannot sustain a claim for "a further sum, *even though he give no receipt in full or at "all.*"

The original claim was a liquidated sum for sale of guns at a contract price; but the amount due was said to be unliquidated because of claimed off-sets.

The court said, 14 (Wall., 547:) "After waiting until "the five years' limitation to actions of this kind *had nearly "expired*, he brings this suit to recover the balance of the "claim, according to the original contract price; and the "question is, can he maintain it?" After referring to the fact that the claimant took the sum found to be due him without protest, or "an intimation of dissatisfaction," the court said: "*He cannot afterwards be heard to say that he did "not accept this in full satisfaction of his demand.*" "It is "difficult to suppose that at this time he had any other "purpose than to acquiesce in the decision which was made.

"*If his purpose were different, why the long delay in insti-*
"*tuting suit?* It is hard to believe that the course subse-
"quently taken *was not the result of an afterthought.*"

The "*afterthought*" in this case first came to Clark in February, 1890, nearly two years after the settlement was made, and then went no further than a claim *in equity*, for the nut locks, as is shown by the following letter written by his representative to the president of the company.:

"Milwaukee, Wis., Feb. 26, 1899.

ROSWELL MILLER, Esq.,
Pres. C. M. & St. Paul Ry. Co.,
Milwaukee.

Dear Sir:

I beg to present for your consideration the following claims *in equity* that have grown out of the construction of your Kansas City extension, namely:

1st. For nut locks furnished, including freight to Ottumwa, Iowa; and putting the locks in place, $10,000. I beg to state that prior to the execution of the contract with Heman Clark and not until track laying was commenced, did the *question* of nut locks come up. They are not referred to in the contract in any way, and the claim is made on the ground that this is an extra.

4th. In addition to this, interest on $35,000 for two years, held by you against unadjusted claims growing out of construction. Respectfully yours,

W. W. HEGEMAN."

(*Rec., p. 308.*)

It will be observed that no claim, even "*in equity*" was then made for the $40,000 which Clark allowed the company in settlement for the overtime penalty, although all the facts and circumstances in relation thereto were as well known at the time the settlement was made as at the present time. The item of interest for two years on $35,000 referred to in the letter, relates to the interest on the $40,000 which was reserved by the company to meet the claims of sub-contractors and others, the full amount of

which was afterwards accounted for by the company to Clark, as was provided in the release which Clark signed when the final payment was made to him. (*Finding 14, Rec. p. 116.*

See, also, *United States vs. Clyde*, 13 Wall., 35, and *Mason vs. United States*, 17 Wall., 73, in which the court says of a similar settlement that "it is a plain case of "voluntary settlement between the parties, *which all courts "hold is final and conclusive.*"

In all of these cases the amount paid was only the amount admitted to be due by the government. It paid nothing but what it admitted it was obligated to pay; and the claimant received nothing for the release of the balance of his claim, except the payment of the amount which the government admitted to be due. It is reasonable to assume that the only items about which there was any real controversy in the *Child* case were those which comprised the $163,111, the amount in dispute; yet the court must necessarily have held that the balance due on the account was in dispute because of the dispute over certain of the items of the account, and therefore the account as a whole was unliquidated, and the acceptance of the amount which the government conceded to be due, on condition that it was paid in full of all demands against it, precluded a recovery of a further sum.

Under all the authorities, an account cannot be said to be liquidated when any item thereof is in dispute, and when such is the case, a release in full, even though it is given upon payment of the amount of the undisputed items of the account only, is conclusive as against the right of the creditor to recover all or any portion of the amount of the disputed items, unless such release

was procured by fraud or was the result of mutual mistake.

Any other rule than this would require that there must exist a dispute over each item of an account in order to make it a disputed and an unliquidated account. This is not the rule. If but a single item of an account is disputed in good faith, the balance due is necessarily in dispute, and consequently the account or demand is unliquidated. And under all the authorities, where neither mistake nor fraud intervenes, the acceptance of any part of the demand as a payment in full, even though it but equals the amount of the undisputed items, precludes further inquiry, as well as further recovery.

By reading the opinion of LACOMBE, J., who wrote the principal opinion, it will be seen that he applied the following rule to and made it decisive of this case:

"Payment by a debtor of a *liquidated* amount, presently "due and to which he has no defense that can be urged in "good faith or with color of right, is not by itself a sufficient "consideration to sustain a release by the creditor of other "*unliquidated* claims against the debtor." (Rec., p. 525.)

The error which the learned judge made, and which pervades the entire opinion, was in assuming that a part of the account was liquidated, and the remaining part unliquidated. In other words, that the account, with the exception of the two items of $40,000 and $9,558.63 was liquidated, and showed a balance of $173,532.49 "presently due," and therefore the payment of that balance constituted no consideration for the release of the claims or items embraced within the account which were disputed, and unliquidated. There is no finding that the parties had liquidated the account between them prior to the liquidation which was made by the settlement of March 9, 1888, or

that the account had in any manner been so adjusted that it was liquidated as to certain items and unliquidated as to certain remaining items. On the contrary, it was expressly found by the *sixteenth* and *eighteenth* findings of fact:

"That no other final settlement of the accounts under "said contract had been had between the plaintiff and the "defendant *at the time* that the said last-mentioned paper "(the instrument of settlement contained in the thirteenth "finding of fact) was signed and delivered."

"That no account was ever, otherwise than by said paper "and the receipt of said money (meaning the instrument of "settlement contained in the thirteenth finding of fact), "stated of the transactions under and connected with said "contract between the plaintiff and the defendant."

So that it affirmatively appears that until the account of March 9, 1888, was rendered to Clark and accepted by him, there had been no liquidation of the account between him and the company. The liquidation then made was a liquidation of the entire account. There was no partial or piecemeal liquidation. And the record will be searched in vain for a single fact or circumstance showing or tending to show that a portion of the account was liquidated and a portion unliquidated. While it is true that the dispute was confined to the two items above mentioned, yet there not having been any statement of the account between the parties, or any agreement as to the *balance due* until the statement and settlement of March 9, 1888, it is manifest that such dispute did not have the effect of adjusting the account, so that prior to such settlement that portion of the account which was not disputed was liquidated, and that portion of it which was disputed was unliquidated. Any such inference as this does violence to the facts found by the *thirteenth, fourteenth, sixteenth and eighteenth* findings of fact and to the conclusion of Judge LACOMBE.

"There is nothing in the findings to show that plaintiff "signed this receipt improvidently or without due consid- "eration, *nor that it failed in any way to set forth accurately "the agreement entered into between the parties on that day.*"

It is apparent from the instrument of settlement itself that the "*agreement entered into*" was an agreement to liquidate the balance due on the entire account, and not the balance due on the undisputed items only, and that prior to the date thereof there had been no liquidation, either partial or otherwise, of the account between the parties; that up to that date the account was an unliquidated, unsettled account. It is equally apparent that on that date there was no partial or piecemeal adjustment or liquidation, but that the account was liquidated as a whole. An account is not liquidated until the balance due is agreed upon by the parties or is fixed by operation of law. To liquidate an account is to adjust it, to settle it; and until the exact balance due is agreed upon, there can be no liquidation of an account.

Century Dictionary.

Abbott's Dictionary of Terms & Phrases, Vol. 2, 50.

13 Am. & Eng. Ency. of Law, 845, 846.

Now, it is found by the *sixteenth* and *eighteenth* findings of fact that no account was ever stated between Clark and the company, or final settlement made of the transactions under and connected with the contract, other than that made and stated by the instrument of settlement of March 9, 1888. By that instrument, and not otherwise, Clark and the company agreed upon the balance that was due on the account. This was the only agreement on the subject. Prior to that date the account was an unliquidated one. On that date it became a liquidated one, not merely

as to the undisputed items thereof, but in its entirety. So that, under the facts, the rule laid down by Judge LACOMBE, as above stated, has no application to this case. The court below disposed of this case upon the assumption or theory that, prior to the settlement of March 9, 1888, a portion of the account had been settled and adjusted between the parties, so that it showed a balance of $173,532.49, and therefore such balance was a liquidated demand, and that the remaining portion of the account comprising the items of $40,000 for overtime forfeiture and $9.558.63 for nut-locks, was left in dispute and was an unliquidated demand; therefore the payment by the company of the liquidated amount was no consideration for the release of the claims that were unliquidated. We respectfully submit that herein the court below erred.

This case may be differently and yet more simply stated. To apply toward the payment of the amount which Clark had earned in the construction of the rail-road, the company claimed credit for the amount which it had paid for the nut-locks furnished to him in the construction of the road, $9.558.63, and the amount which he had agreed to allow it by way of forfeiture in case the road was not completed by June 1, 1887—$40.000. Clark, by accepting the settlement offered him in the statement of account of March 9, 1888, allowed these credits; and neither fraud nor mistake having intervened, such allowance is as binding upon him as a payment would have been had the company presented these claims to him and he had paid them in cash. He stands in this action precisely as he would stand had he paid the company $49.-558.63 in cash in satisfaction of these claims, and had then brought suit to recover back. It is needless to add that, unless the payment so made was obtained by duress or

fraud, or was made by mutual mistake, the amount thereof cannot be recovered back.

In other words, the findings of fact show that the company paid Clark the full amount which he earned in the construction of the road, $3,895,798.79, and the amount allowed him for certain material, rebates, etc., $34,598.90, making a total of $3,930,397.69, and *$521.75 more.* (*Findings 13 and 14, Rec., pp. 113-16, and 11 Rec., 136.*) The question involved in this case is the same as would have arisen had Clark held the company's note for $100, and in payment thereof the company had tendered him $75 in cash and a claim for materials furnished him amounting to $25. and he had allowed the claim, received the cash and surrendered the note, and then had brought suit to recover $25, the balance alleged to be due on the note. Neither fraud, duress nor mistake having intervened, it must be conceded that no recovery could be had, and that even a finding of fact or a conclusion of law that Clark was not legally liable for the materials for which the claim was made would not change the result.

But this is not all. By turning to the instrument of settlement, it will be observed that in addition to the amount earned by Clark under the contract, as shown by the final estimate of the chief engineer of the company, there was credited or allowed to him in the settlement the sum of $34,598.90 for material sold by him to the company and for certain rebates and other matters of that description. By turning to the contract (Rec., pp. 146-188), and the final certificate and estimate of the chief engineer (Rec., pp. 127-135), it will be seen that this item of $34,598.90 represented no part of the work specified under the contract, nor extra work, nor materials ordered by the company, and that it was not included in the contract or in the

certificate and final estimate of the chief engineer. It was, therefore, not liquidated by either the contract or the chief engineer of the company. Speaking of this item, LACOMBE, J., said:

"Therefore, it was not liquidated by the original contract, "nor by any action of the chief engineer thereunder. In- "deed it is plain to a demonstration from the findings that "the item in question was not included either in the original "contract or in the extra work, and must represent an addi- "tional and independent contract of sale." (Rec., p. 533.)

Hegeman, Clark's representative and principal witness, in speaking of this item when testifying, said:

"I understand that was a trade outside of the contract; that it was for materials and stuff taken off our hands, like ties, and possibly rails, spikes and bolts which was left over." (Rec., p. 261.)

It is apparent that this item related to matters entirely outside of the accounts under the contract for the construc- tion of the road, and that it was injected into the accounts and made a part of the statement of account on which the settlement of March 9, 1888, was made in order that the settlement then made would be a full and final settlement of all matters and transactions had or pending between the parties. We contend that the allowance of this large credit to Clark in the settlement was a sufficient consideration to support the settlement independently of the consideration hereinbefore stated.

In the opinion of LACOMBE, J., in passing upon this question, it is said:

"This sum is by the statement of account set forth in such "receipt credited to Clark, and is included in the $173,532.49 "paid to him upon his signing such receipt. From what has "been said before, it is plain that, if at the time of the trans- "actions relied upon as showing an accord and satisfaction, "this sum of $34,598.90 so allowed to Clark represented an

"*unliquidated* item, the amount of which he would have to "establish by evidence in case he had sued to recover it, its "allowance to him upon the settlement of March 9, 1888, "would be a sufficient consideration to uphold that settle- "ment against him as an accord and satisfaction of all his "claims." (Rec., p. 532.)

There is no finding, whatever, that said amount of $34,598.90 had ever been agreed upon or liquidated by the parties in a manner that would have entitled Clark to recover that amount from the company as an independent item, otherwise than by the statement of it in the account preceding, and which formed a part of the receipt and acknowledgment of satisfaction which Clark executed and delivered to the company March 9, 1888; nor is there any finding showing or tending to show that the company would have allowed that credit to Clark except as an item in that account, in which he should likewise allow credit to the company for the amount of the charge for nut-locks and forfeiture. The learned judge, however, seems to hold that because of the fourteen finding of fact, "*that said receipt and paper contained an accurate, truthful and undisputed account of all dealings between said parties, except in the matter of the $40,000 deducted for time forfeiture, and the $9,558.63 for nut-locks*," he must assume that the referee was satisfied from the testimony that the prior transactions between the parties were such that this sum was no more open to dispute than was the sum of $3,895,798.79, to which the chief engineer had certified. The learned judge also stated that it does not appear in the findings by what process this item of $34,598.90 was so liquidated. (Rec., p. 533.)

It thus appears that, but for the conclusion that this item of $34,598.90 had been liquidated by the parties prior to

the statement of account and settlement of March 9, 1888, the court below would have held that the allowance thereof as a credit to Clark would have been a sufficient consideration to uphold the settlement. Was the court right in this conclusion? We think it can be shown to a demonstration that it was not. In holding that, because it is found by the *fourteenth* finding of fact that the statement of account upon which the settlement was made, contained an *undisputed* account of all dealings between the parties, excepting the $40,000 deducted for time forfeiture and the $9,558.63 for nut-locks, Clark and the company had, prior to the time such statement of account and settlement were made, agreed that the value of the materials, rebates and other matters of that description was $34,598.90, and that the company would buy such material and allow the rebates at that sum, the court below assumed, without any finding of fact to support it, that there had been prior transactions between Clark and the company which effected a liquidation of that item. For the learned judge says:

"By what process it was so liquidated does not appear in "the findings. We must take his finding (meaning the "fourteenth finding of fact), therefore, as conclusive upon "the question, *and assume* that either by agreement for a "price in advance, or subsequently by entering into some "binding agreement as to the sum to be paid, the defendant "had lost its right to throw the plaintiff into court as to that "item." (Rec., p. 533, 534.)

Herein the court below seriously erred.

1. The assumption is contrary to the finding and conclusion of the referee, to-wit: "That no account of the transactions under the contract, *and of the claims sued on in this action*, was ever had or stated between the parties to this action, otherwise than by said receipt or paper of March 9, 1888." (Rec., p. 119.)

This finding, or conclusion, is neither mentioned nor referred to in either of the opinions of the court below.

By referring to Subdivision 6 of the first cause of action set forth in the amended complaint (Rec., p. 33), it will be seen that this item constituted a part of "*the claims sued on in this action.*" It therefore affirmatively appears, that otherwise than by the statement of account and settlement of March 9, 1888, there had been no account had or stated between Clark and the company, whereby the item of $34,598.90 had become a liquidated demand. The value of the materials, rebates, and other matters covered by this item, must, therefore, not only *not* have been agreed upon prior to that date, but the company had not, prior to that time, obligated itself to buy such material or allow such rebates. It was not enough that the value of this material and these rebates, and other matters, should have been undisputed, for these matters did not pertain to the contract for the construction of the road, nor to the accounts between the parties arising thereunder, and, therefore, the fact that the items represented by this amount were undisputed imposed no obligation upon the company to purchase the material or allow the rebates, or to allow the amount thereof as a credit to Clark in the adjustment and settlement of the accounts under the contract. And without the obligation to purchase such material and allow such rebates, the fact that the value and the amount thereof were undisputed was of no advantage or value to Clark.

We must, therefore, look to the statement of account upon which the settlement of March 9, 1888, was made, as the "*process*" by which this item was liquidated, and the amount thereof allowed as a credit to Clark in effecting that settlement; for otherwise than by that instrument, receipt or paper there was no account had or stated between

the parties of the transactions under the contract *and of the claims sued on in this action*, nor was there any obligation incurred by the company to purchase such material or allow such rebates, or to credit the amount thereof to Clark in the settlement of the accounts under the contract or arising out of the construction of the road.

That statement of account, in the absence of any finding to the contrary, we submit, fully sustains our position that this large credit was allowed Clark as an element of consideration in the adjustment and settlement of the accounts under the contract.

2. But if the findings are such that resort must be had to assumptions, we submit that whatever assumptions are made should be in favor of the settlement and not against it. The law favors settlements and lends every presumption to support them. The presumption always is that they were made in good faith, without fraud or mistake, and that a consideration sufficient to support them existed. The burden, therefore, was with Clark to show, not only that the value of the material and rebates had been agreed upon at $34,598.90 prior to the rendition of the statement of account of March 9, 1888, but that prior to that date the company had bound itself to buy the material and allow the rebates at that sum. If, therefore, the findings are such that the court cannot determine from them when or by what process the item in question was liquidated, then the burden which the law cast upon Clark was not met by him, in which event the court is at liberty to presume, and should presume, that the company would not have allowed that credit to Clark, except as an item in the account in which he should in turn allow

credit to the company for the amount claimed by it for nut-locks and forfeiture, and that the settlement which was made was induced by the allowance to Clark of that item.

The court below, it is submitted, applied the wrong rule in this case, and instead of seeking to find some ground to sustain the settlement made by the parties themselves, and acquiesced in by Clark for nearly six years before the suit was brought, seems rather to have sought after some ground upon which to overthrow it:

"No practice could be more dangerous than that of "opening accounts which the parties themselves have ad- "justed on suggestion supported by doubtful or by only "probable testimony. * * * The whole labor of proof "lies upon the party objecting to the account, *and errors "which he does not plainly establish cannot be supposed to "exist.*"

Chief Justice MARSHALL in *Chappedelaine vs. Dechenaux*, 4 Cranch., 309.

POTTER, J., in *Jaffray vs. Davis*, 124 N. Y., 168, said:

"They (the courts) have seemed to seize with avidity "upon any consideration to support the agreement to accept "the lesser sum instead of the larger, or, in other words, to "extract, if possible, from the circumstances of each case, a "consideration for the new agreement, and to substitute "the new agreement in place of the old, and thus form a "defense to the action brought upon the new agreement."

ELLISON, J., in *Henson vs. Stever*, 69 Mo. App. Rept., 136, 141, said:

"The courts regard the rule preventing a creditor from "making a valid contract to take a less sum of his debtor "in discharge of a greater as technical and unreasonable, "and they are eager to find some element in the transac- "tion which can be held to be a consideration."

NELSON, J., afterwards one of the justices of this court, in *Kellogg vs. Richards*, 14 Wend., 119, said:

"The rule that the payment of a less sum of money, "though agreed by the plaintiff to be received in full satis-"faction of a debt exceeding that amount, shall not be so "considered in contemplation of law, *is technical and not "very well supported by reason. Courts, therefore, have "departed from it on slight distinctions.*"

Applying the doctrine of these cases, we submit that the allowance by the company to Clark of the large credit of $34,598.90 in the adjustment and settlement of the accounts under the contract, was a sufficient consideration to support the settlement, independently of the consideration which the dispute between Clark and the company over the items of $9,558.63 for nut-locks and $40,000 for forfeiture furnished, which items were embraced in the accounts under the contract, and which dispute we insist also furnished an undoubted consideration for the settlement.

II.

The court below erred in holding that the question, whether there was any evidence in the record to sutain the findings that the defendant company in June, 1888, wrongfully took possession of certain lumber belonging to the plaintiff and converted it to its own use, was not reviewable.

The findings are as follows:

That in or about the months of March and April, 1888, the plaintiff was the owner of 97,000 feet B. M. bridge timber then in the yard of the defendant at Chillicothe, and along the line of the railroad.

That the said lumber did not conform to the standard of the defendant, and was not purchased by the defendant from the plaintiff, or allowed in the final certificate of the chief engineer, under the contract in this section to the plaintiff.

That in and about the month of June, 1888, the defendant took possession of the said lumber and converted the same to their own use without assent or knowledge of the plaintiff.

That the value of the said lumber at the time of the taking in June, 1888, was $2,425. (Rec., p. 117.)

The record will be searched in vain for any legal evidence to sustain these findings.

The witnesses who testified in behalf of Clark, were *Hegeman, Van Aiken, Russell* and *House.* Their testimony will be found at pages 246, 247, 375, 278, 380, 384, 336 and 388 of the printed record.

It appears from Hegeman's testimony (Rec., p. 375), that he never saw any of the timber in question after March 1, 1888, not having been at Chillicothe after March until August or July, 1888; *that he had no personal knowledge of what use had been made of the timber or what was done with it.* In 1890 he wrote to Whittemore, the chief engineer of the company, *stating that he was informed*, that at the time of the washouts south of Chillicothe, during the Summer of 1888, this bridge timber was used by the company, and asked him to investigate the matter. (Rec., p. 246.) Whittemore did so, and reported to Hegeman that he could not find that there had been any timber used by the company that belonged to Clark. (Rec., p. 311.)

VanAiken, who was one of Clark's sub-contractors, tes-

tified that there was some bridge timber left over in March, 1888, and that when he went back there the following Summer, he did not find it. He says, however, "*I haven't any idea as to what became of this timber, from personal knowledge, only from hearsay.*" (Rec., p. 278.)

Russell testified, that the last time he was at Chillicothe, was in December, 1887, or January, 1888 (this was six months before the timber is alleged to have been taken); that there was some timber scattered along the road, but that he did not know to whom it belonged; nor could he say how much of it there was, *nor what use was made of it, as he was not there at the time.* (Rec., p. 384.)

House, the only other witness for Clark, testified that he was roadmaster for the company, and was located at Chillicothe, and had to do with repairing the washout for the company in June, 1888; that the lumber to make the repairs came from the Chillicothe yard; *that he did not know whose lumber it was that was used;* whether Van-Aiken's, the sub-contractor, or Clark's, or the railway company's; *that the railway company had a large amount of lumber at the Chillicothe yard which was used; that he remembered distinctly that he was notified not to take any lumber or timber that was said to belong to VanAiken, the contractor.* (It was the VanAiken lumber that it is claimed was taken by the company.) House closes his testimony by saying: "*I do not know, as a matter of fact, whether that* (referring to the timber in question) *was taken or not.*" (Rec., pp. 386-388.)

On behalf of the company, Whittemore, its chief engineer, testified, that in March, 1890, he received a letter from Hegeman, Clark's representative, stating *that he had been informed* that the company had used certain bridge timber

belonging to Clark, in repairing a washout in June, 1888, and asking that the matter be investigated; that he immediately caused an investigation to be had, and reported to Hegeman; that he was unable to find that any timber had been used by the company which belonged to Clark. (Rec., p. 311.)

Kuehnle, a witness for the company, testified that he was foreman of the Chillicothe yard in 1888, and selected the lumber which the company took off of Clark's hands at the close of the work (which was the lumber that was included in the item of $34,598.90 allowed as a credit to Clark in the settlement); that this lumber was separated and piled in the Chillicothe yard of the company in the east end of the yard; that there was a lot of lumber that the company did not accept, which was left in the south or lower end of the yard. He says:

> "That consisted of some bridge timber and bridge ties, and some poor cull ties. I understood that some of Clark's foremen sold some of it to private parties, farmers and some people that lived around the city. It was taken away during that same Winter and up until Spring. I was there in June, 1888. I remember the time of the washout near Chillicothe in June, 1888. * * * None of this lumber that was set aside there that was not taken by this company from Mr. Clark was used at the time of that washout, or in any of the washouts. We used the company's lumber. We were particular about that. There was no more of Mr. Clark's lumber there at that time. It had all been taken away before that—it was all gone. I am quite sure none of it was used for any purpose connected with that washout or any of these washouts." (Rec., p. 342.)

He says, further:

> "This lumber was not there before the washouts. I could not give the names of the foremen that sold this lumber. There was one man named Clark. I seen him.

He hauled some stuff away; he did not haul it—he had it hauled. He was a foreman of Clark's. I do not know his first name." (Rec., p. 344.)

And further:

"The company did not sell any of that lumber that was in the south end of the yard. They did not haul it away or have it hauled away. They did not use any of it." (Rec., p. 345.)

Re-cross examination by Mr. Rose.

"They got the material that was used in repairing these washouts out of the general yard. That was on the other side of the coal shed at Chillicothe. I saw them haul it away in the cars, and assisted them in loading it." (Rec., p. 345.)

There was therefore no evidence whatever showing or tending to show that any lumber belonging to Clark was used by the company in repairing the washout in June, 1888, or at any other time. On the contrary, it was affirmatively shown by Kuehnle, who was at Chillicothe during the washouts of June, 1888, and assisted in shipping the lumber which was used in repairing such washouts, that none of the lumber so used belonged to Clark or was taken out of that portion of the yard where his lumber was piled, but that the lumber which was used was all taken from the east end of the yard where the company's lumber was piled and none but the company's lumber used. The findings therefore are not only wholly unsupported by any competent evidence, but are contrary to the testimony produced by the company, which stands uncontradicted.

A finding without any evidence whatever to support it presents a question of law and is an error of law, and has always been regarded as a ruling upon a question of law.

Booth vs. R. R. Co., 67 N. Y., 593.
Pollock vs. Pollock, 71 N. Y., 137, 146.
Halpin vs. Ins. Co., 118 N. Y., 165, 170.

A similar rule prevails in the courts of the United States, where it is held to be the duty of the court to direct a verdict, one way or the other, where there is no evidence to sustain a verdict to the contrary, or where such a verdict would be set aside, if rendered.

Improvement Co. vs. Munson, 14 Wall., 447, 448.

Pleasants vs. Fant, 22 Wall, 116.

R. R. Co. vs. Houston, 95 U. S., 697, 703.

Griggs vs. Houston, 104 U. S., 553.

Schofield vs. C. M. & St. P. Ry. Co., 114 U. S., 615.

Dwight vs. Ins. Co., 103 N. Y., 358, 360.

Reynolds vs. Great Northern Ry. Co., 69 F. R., 810.

If the facts are found by the court they are conclusive only in case there is a conflict of evidence, or if there is *any* evidence to sustain it; and the Appellate Court will examine the evidence for the purpose of ascertaining whether there is any such evidence.

Lancaster vs. Collins, 115 U. S., 222.

Runkle vs. Burnham, 152 U. S., 217, 225.

Beuttel vs. Magone, 157 U. S., 154, 158.

Chrystie vs. Foster, 61 F. R., 551 (9 C. C. A., 606).

Fisher vs. U. S. Natl. Bank, 64 F. R., 710, 12 (26 U. S. App., 448, 452).

Merion vs. Magone, 70 F. R., 776.

Magone vs. Origet, Id., 778.

Kirtz vs. Peck, 113 N. Y., 222.

B. S. Co. vs. M. C. R. Co., 134 N. Y., 20.

The question whether there was any legal evidence to support the findings and the judgment entered thereon as

to the item of $2,425 for bridge timber alleged to have been wrongfully converted by the company in June, 1888, is raised by the refusal to find as requested, that the company did not in the month of June, 1888, or at any other time, wrongfully or otherwise take possession of any timber belonging to Clark, or convert the same to its own use (Request No. 37; Rec., p. 211), the exception thereto, (Exception No. 27; Rec. p. 463; also Exception No. 17; Rec., p. 456) and the several assignments of error, particularly the *seventy-fourth* assignment of error (Rec., p. 501). *These exceptions and assignments of error were based expressly upon the ground that there was no proof in the case to sustain the findings that the company wrongfully or otherwise took or appropriated the timber in question.* A question of law was therefore presented. LACOMBE, J., in disposing of these findings of fact, said:

"Indeed, the only objection urged by plaintiff in error is "that there was not competent evidence to sustain the find-"ings of fact; *but that question is not reviewable here.*"(Rec., p. 535.)

We respectfully submit, that if there was no competent evidence to sustain these findings, and that question was saved by proper requests, exceptions and assignments of error, as it clearly was, it was reviewable by the court below and is reviewable by this court.

III.

The court below erred in holding that it was proper to allow the plaintiff to amend his complaint on the trial against defendant's objection by adding thereto a cause of action sounding in tort, and recover thereon.

Irrespective of the fact whether the company did or did not take and use any timber which was left over by Clark or his sub-contractors, in repairing a washout or otherwise, in June, 1888, or whether there is or is not any testimony to sustain the findings that were made on that subject, Clark should not have been allowed to recover for such timber in this action.

The claim for such timber was originally included in the second cause of action stated in the original complaint, which was for work performed and material furnished "in excess of that called for by the contract" and is specified in the bill of particulars as:

> "97,000 ft. B. M. bridge timber taken and used by the company during washout south of Chillicothe, about June, 1888, $2.425." (Rec., p. 17.)

This claim, as stated, does not come under the head of any material furnished in the construction of the road under the contract not called for by the contract, but is in relation to a matter entirely outside of the contract, and which, as alleged, arose after the work was all completed, and there had been a final settlement between the parties of all matters arising under the contract or out of the construction of the road.

It is evident, from this statement of the claim, that it had nothing to do with the cause of action stated in the original complaint as extra work or material furnished in the

construction of the road under the contract, but was matter outside of it. Counsel for Clark, realizing this situation of the claim, sought by the amendment to the complaint to add a cause of action that the company had *wrongfully* and without the knowledge or consent of Clark taken possession of such lumber and *converted* the same to its own use. The amendment by which this cause of action was inserted in the complaint was allowed during the trial after the plaintiff had rested, and against defendant's objection that no amendment could be allowed which changed the cause of action from one cause to another, and an inconsistent one, or which changed a cause of action on contract to one in tort, or which added inconsistent allegations. (Rec., pp. 281, 282.) The objection was overruled, the amendment allowed as the *fifth* cause of action (Rec., pp. 36, 281), and defendant excepted. The objection on the ground stated, and the exception to the overruling of the objection sufficiently raised the question and saved defendant's rights in the matter. This action is presented and questioned in and by the *seventeenth* assignment of error. (Rec., p. 482.)

As included, or embraced in the second cause of action of the original complaint, this claim was disallowed, as it was found by the 12th additional finding of fact (Rec., p. 136), that the company did not require Clark to furnish any materials not required and agreed to be furnished by him by the terms and provisions of the contract, except or otherwise than as stated and allowed for in the final estimate of the chief engineer; nor did he furnish any material not required by the contract, except as allowed for as aforesaid.

It is a well-settled rule that a cause of action in tort which is the nature of the cause of action stated in the *fifth*

cause of action of the so-called amended complaint, cannot be united with causes of action on contract.

Raynor vs. Brennan, 40 Hun., 60.
Keep vs. Kaufman, 56 N. Y., 332.
Miles vs. Suydam, 64 N. Y., 173.
Miller vs. Tuska, 87 N. Y., 166.
Bowen vs. Mandeville, 95 N. Y., 237.

The cause of action stated in the *fifth* cause of action is certainly one founded in tort; for it is alleged *that the company, without the knowledge and consent of Clark, wrongfully took possession of certain timber and converted the same to its own use, to his damage in the sum of $2,425.*

Considered as two separate causes of action in the same complaint, without regard to the fact that the cause of action for conversion of the timber was embodied in the complaint by an amendment allowed upon the trial, but treated as if originally in the same complaint, the two causes of action, one for the recovery of the value of the lumber as extra material furnished, and the other for the value of the lumber as *wrongfully converted* by the company to its own use, are inconsistent with each other; one as an action on contract, and the other as an action in tort. The plaintiff must elect upon which cause of action he will proceed; he cannot have both.

Southworth vs. Bennett, 58 N. Y., 569.
Stewart vs. Huntington, 124 N. Y., 127.

No amendment to a complaint can add what amounts to a new cause of action. Where the two causes of action

are distinct, it is not competent at the trial to make the substitution of one for the other.

Ross vs. Mather, 51 N. Y., 108.
Dudley vs. Scranton, 57 N. Y., 424.
Price vs. Brown, 98 N. Y., 338.
Freeman vs. Grant, 132 N. Y., 22-29.

Where a party has an election between two inconsistent remedies he is confined to that which he first chooses, and cannot change. The remedies are not concurrent, and the choice between them once made, the right to follow the other is forever gone.

Sanger vs. Wood, 9 Johns. Cas., 416.
Littlefield vs. Brown, 1 Wend., 398, and 11 Wend., 467-470.
Morris vs. Rexford, 18 N. Y., 552.
Rodermund vs. Clark, 46 N. Y., 354.
Goss vs. Mather, Id., 689.
King vs. Ealvin, 4 Hun., 258.
Stenfield vs. Simonson, 44 Hun., 29.
Fowler vs. Savings Bank, 113 N. Y., 450.
Bach vs. Tuck, 126, N. Y., 53.

That which plaintiff could not maintain separate actions for, he cannot unite in one and the same complaint as separate and distinct causes of action.

Bank vs. Beale, 34 N. Y., 473.
Cobb vs. Hatfield, 46 N. Y., 536.
Kennedy vs. Thorpe, 51 N. Y., 174.
Conrow vs. Little, 115 N. Y., 387.
Terry vs. Munger, 121 N. Y., 161.

A party cannot adopt one remedy as to a part and an in-

consistent remedy as to another part of the same transaction.

Gardner vs. Ogden, 22 N. Y., 327-340.
Strong vs. Strong, 102 N. Y., 69.
Scarf vs. Jardine, 7 App. Cases, L. R., 345.
Riley vs. Savings Bank, 36 Hun., 573.
Hentz vs. Havemeyer, 15 Appl. Div., 357.

In disposing of this question, the court below, by LACOMBE, J., said:

"Having waived the tort, and elected to sue on implied "contract, plaintiff could quite properly include this cause "of action in his complaint." (Rec., p. 535.)

The force of this statement is not perceived when it is considered that the averments stating this cause of action conform with the averments that are usually found in the forms prescribed for declarations in trover. So far as the record shows, there is nothing to indicate that the plaintiff had waived the tort and elected to sue on implied contract.

IV.

The judgment should be reversed and the cause remanded, with directions to the circuit court to enter judgment in favor of defendant company for the amount of its counter-claim, to-wit: $521.75, as found by the fourteenth and eleventh findings of fact. (Rec., pp. 116, 136.)

If the judgment herein shall be reversed *in toto*, as we contend it should be, then the reversal should be with directions to the Circuit Court to enter judgment in favor of the company for the sum of $521.75, with interest from June 30, 1888, and costs; if it shall be reversed only in part, as

to the two items of $9,558.63 and $40,000, embraced in the *first* cause of action, and affirmed as to the item of $2,425, embraced in the *fifth* cause of action, then the cause should be remanded, with directions to the Circuit Court to enter judgment in favor of the company, dismissing the complaint as to all of the causes of action embraced therein, excepting the fifth cause of action, on which judgment should be entered in favor of Clark, for the sum of $2,425 and interest thereon from June 30, 1888, less said sum of $521.75 and interest thereon from said date.

The counter-claim in favor of the company for $521.75 arose in this wise: By referring to the instrument of settlement of March 9, 1888, it will be seen that Clark consented that $40,000 should be retained by the company from the amount due him, for the purpose of paying certain claims then pending against the company and from which Clark had agreed, in his contract for constructing the road, to save the company free and harmless, the company agreeing to account for the $40,000. (*This $40,000 should not be confounded with the $40,000 which was allowed to the company under the supplemental contract, by which that amount should be forfeited if the road was not completed by June 1, 1887.*) Subsequently the company paid out in settlement of claims the whole of said $40,000 and $521.75 more, therefore the counter-claim for that amount. (See *fourteenth* and *eleventh* findings of fact. Rec., pp. 116, 136.)

The findings of fact, particularly the thirteenth (Rec., p. 113), the twenty-second, twenty-third, twenty-fourth and twenty-fifth (Rec., pp. 203-207), and the twelfth (Rec., p. 136), entitle the company to a judgment dismissing the complaint as to all of the causes of action, excepting the fifth,

which relates to the item of $2.425 for bridge timber alleged to have been taken by the company in June, 1888, and for judgment in its favor for the amount of the counter-claim set up in its answer, for $521.75, with interest and costs.

The state of the record is such that if a reversal of the judgment is ordered in whole or in part, a trial *de novo* should not be ordered, but the cause should be remanded to the Circuit Court with directions to enter such judgment as this court shall decide is warranted by the record. This it has power to do by *Section 701 of the Revised Statutes of the United States*, which provides that this court may modify or reverse any judgment of the Circuit Court brought before it for review, or may direct such judgment, decree or order to be rendered, or such proceedings to be had as the justice of the case may require. This was done in

L. M. & C. Ry. Co. vs. United States, 108 U. S., 277-280; and in

C., M. & St. P. Ry. Co. vs. Hoyt, 149 U. S., 1-17.

We also submit that if the judgment shall be reversed only as to the two items of $9,558.63 and $40,000 embraced in the *first* cause of action, and affirmed as to the item of $2.425 embraced in the *fifth* cause of action, the justice of the case requires that Clark should not recover any costs other than those incurred in the prosecution of the claim embraced within the *fifth* cause of action; that he should not be allowed to recover the costs incident to the reference, including the fees of the referee, stenographer, etc.; as no part of such costs were necessarily incurred in the prosecution of the claim asserted in the fifth cause of action. Substantially all the costs of this action were incurred because

of the reference, which was made necessary by the claims that were asserted under the contract for the construction of the road, for extra work, etc., and on which Clark failed. He ought not therefore to have or recover such costs. In remanding this cause to the Circuit Court, it is submitted that this court has the power, and should give directions as to what costs either party is entitled to recover as against the other.

Respectfully submitted.

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